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WILCOX & CO.

No. 2814

1068

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT. 1068

EASTERN OREGON LAND COMPANY,
a corporation,

Appellant,

vs.

DESCHUTES RAILROAD COMPANY,
a corporation,

Appellee.

DESCHUTES RAILROAD COMPANY,
a corporation,

Appellant,

vs.

EASTERN OREGON LAND COMPANY,
a corporation,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the District of Oregon.

GLASS & PRUDHOMME CO., PORTLAND, OREGON

No._____

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EASTERN OREGON LAND COMPANY,
a corporation,
Appellant,

vs.

DESCHUTES RAILROAD COMPANY,
a corporation,
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a corporation,
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TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the District of Oregon.

GLASS & PRUDHOMME CO., PORTLAND, OREGON

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INDEX—Continued.

Witness for Defendant (Continued):

United States Circuit Court of Appeals for the Ninth Circuit.

Eastern Oregon Land Company,
a corporation,
Appellant,

vs.

Descuhtes Railroad Company,
a corporation,
Appellee.

Deschutes Railroad Company,
a corporation,
Appellant,

vs.

Eastern Oregon Land Company,
a corporation,
Appellee.

NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD.

Veazie, McCourt and Veazie,
Corbett Building, Portland, Oregon; and

Teal, Minor and Winfree,
Spalding Building, Portland, Oregon,
For the Eastern Oregon Land Company.

Mr. A. C. Spencer, and
Mr. W. A. Robbins,
Wells Fargo Building, Portland, Oregon, and

Mr. James G. Wilson,
Platt Building, Portland, Oregon,
For the Deschutes Railroad Company.

CITATION ON APPEAL.

United States of America,
District of Oregon,—ss.

To Deschutes Railroad Company, a corporation, Defendant,

Greeting:

WHEREAS, the Eastern Oregon Land Company, plaintiff, has lately appealed to the United State Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law:

You are, therefore, hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, Oregon, in said District, this 15th day of May, in the year of our Lord one thousand nine hundred and fifteen.

R. S. BEAN,
Judge.

District of Oregon,
County of Multnomah,—ss.

Due service of the within citation on appeal is hereby accepted in Multnomah County, Oregon, this 15th day of May, 1915, by receiving a copy thereof, duly certified to as such by A. L. Veazie one of the attorneys of the plaintiff.

W. A. ROBBINS,
One of Attorney for Defendant.

Filed May 15, 1915.

G. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon.

EASTERN OREGON LAND COMPANY, a corporation,

Complainant,

vs.

DESCHUTES RAILROAD COMPANY, a corporation,

Defendant.

CITATION.

The President of the United States of America to To Eastern Oregon Land Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals

for the Ninth Circuit to be held in the city of San Francisco, State of California, within thirty (30) days from the date of this writ, to-wit: On the 14th day of June, 1915, pursuant to a notice of appeal and order of the court allowing the same, filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein the Eastern Oregon Land Company, a corporation, is complainant, and the Deschutes Railroad Company is defendant, to show cause, if any there be, why the decree and judgment rendered against the defendant and in favor of the complainant for costs, as in said notice of appeal and order allowing the same mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 15th day of June, A. D. 1915, and of the independence of the United States the One Hundred and Thirty-ninth.

R. S. BEAN,
United States District Judge Presiding in said Court.

Due and personal service of the above Citation and receipt of a copy thereof is hereby admitted this 15th day of May, A. D. 1915.

A. L. VEAZIE,
Solicitor for Complainant.

Filed May 15, 1915.

G. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon.

November Term, 1913.

BE IT REMEMBERED, That on the 12th day of November, 1913, there was duly filed in the District Court of the United States for the District of Oregon, a Second Amended Bill of Complaint, in words and figures as follows, to-wit:

SECOND AMENDED BILL OF COMPLAINT.

In the District Court of the United States for the District of Oregon.

Eastern Oregon Land Company, a corporation,
Complainant.

vs.

Deschutes Railroad Company, a corporation,
Defendant.

AMENDED COMPLAINT.

To the Honorable Judges of the Above Entitled Court:

Eastern Oregon Land Company, a corporation organized under the law of the State of California, brings this its amended and supplemental bill of complaint against Deschutes Railroad Company, a corporation organized under the laws of the State of Oregon, as defendant, and for its cause of suit humbly showeth unto your Honors:

I.

Your orator is a corporation duly organized under and by virtue of the laws of the State of California, and has its principal office and place of business in the City of San Francisco in the State of California, and is a citizen of the State of California within the meaning of the acts of Congress of the United States prescribing the jurisdiction of the District Courts of the United States.

II.

The defendant is a corporation organized under the laws of the State of Oregon and has its principal office and place of business in the City of Portland in the State of Oregon, and is a citizen of the State of Oregon within the meaning of the acts of Congress of the United States prescribing the jurisdiction of the District Courts of the United States.

III.

Prior to the organization of the defendant as a corporation and to the location of defendant's line of railway across the lands of your orator as hereinafter set forth, the complainant filed with the Secretary of State, of the State of Oregon a duly certified copy of its articles of incorporation, and made and filed with the same officer a power of attorney whereby it appointed an agent in the State of Oregon upon whom service of summons may be had, and paid to the State of Oregon all sums of money required by the laws of the State of Oregon to be paid by foreign corporations to transact

business in this state and in all respects complied with all of the statutes of the State of Oregon regulating the admission of foreign corporations to do business in the State of Oregon, and has at all times paid all license fees and other sums required of it by the State of Oregon for such purpose, and was and is entitled to do business in the State of Oregon and to transact any business in said state which it is authorized and permitted to transact by its articles of incorporation and the amendments thereof.

IV.

In and by its articles of incorporation and the amendments thereof your orator is organized for the purpose and has power, among other things, to purchase, sell, exchange, lease, mortgage, pledge, hold, enjoy, incumber and deal in lands, water rights and water privileges and interests in lands, water rights and water privileges of every kind and nature whatsoever situated in the State of Oregon and elsewhere, and to engage in and carry on the business of dealing and operating in real estate, and to acquire, own, purchase, sell, incumber, hold, enjoy and dispose of water for all legitimate purposes, and to appropriate and use the waters of the rivers, streams and lakes in the State of Oregon and elsewhere for all legitimate purposes, and under and by virtue of its articles of incorporation and for the purposes for which it is incorporated and of the laws of the State of Oregon, had at all times herein mentioned and now has power, among other things, to appropriate lands, water, water rights and other property

for public use and for the uses and purposes for which it is incorporated.

V.

Your orator showeth unto your Honors that theretofore, in the year 1871, one J. H. Sherar purchased of a settler upon the public lands of the State of Oregon the possessory right to a strip of land extending on both sides of the Deschutes River from the mouth of Buckhollow on the North to the mouth of White River on the south, a distance of over three miles, and made settlement upon the said lands in 1871, and said lands at said time were public lands of the United States of America and unsurveyed, and said Sherar settled upon said lands with the intention of acquiring title thereto from the United States of America under and in pursuance of the laws theretofore passed by the Congress of the United States of America, and at said time in force, regulating the disposition and sale of public lands of the United States. At the time of such purchase by said Sherar and of the settlement of said Sherar upon said lands, there was a toll-bridge crossing the Deschutes River upon said lands and toll-roads leading from said bridge on either side of said river, and said Sherar purchased the said toll-bridge and toll-roads and built his residence upon the said lands near said bridge and resided on said lands until his death in the year 1908, and from the time of his settlement to the date of his death in 1908, said Sherar was in exclusive occupancy of said lands and said lands were generally recognized as belonging to and were claimed by said

Sherar and were used by said Sherar for the purposes for which they are best adapted.

VI.

Subsequently title to certain portions of said lands was acquired from the United States of America in pursuance of the laws of the acts of Congress at various times as follows:

Title to the North half (N½) of the Southwest quarter (SW¼) of Section 35, Township 3 South, Range 14 East by entry dated January 27, 1906; to Southeast quarter (SE¼) Section 34 in said Township and Range by entry dated May 25, 1881; to Lot 1 in Section 3, Township 4 South, Range 14 East by entry dated December 17, 1904; to Lot 2 in said Section 3 by entry dated February 13, 1906; to Southwest quarter (SW¼) of Northeast quarter (NE¼) of said Section 3 by State School Indemnity Selection made December 5, 1903; to Southeast quarter (SE¼) of Northwest quarter (NW¼) of said Section 3 by entry dated February 13, 1906; to West half (W½) of Southeast quarter (SE¼) and East half (E½) of Southwest quarter of said Section 3 by entry dated March 10, 1903; to East half (E½) of Northwest quarter (NW¼) of Section 10 in said Township, and Range by entry dated November 29, 1904; to West half (W½) of Northwest quarter (NW¼) of said Section 10 by entry dated January 2, 1906; to Northwest quarter (NW¼) of Southwest quarter (SW¼) of said Section 10 by entry dated January 27, 1906, to Northeast quarter (NE¼) of Southeast quarter (SE¼) of Sec-

tion 9, Township 4 South, Range 14 East by entry dated January 27, 1906; to Northwest quarter (NW¼) of Southeast quarter (SE¼) of said Section 9 by entry dated December 16, 1904; to Northeast quarter (NE¼) of Southeast quarter (SE¼) of said Section 9 by entry dated December 16, 1904; to Northwest quarter (NW¼) of Southwest quarter (SW¼) of said Section 9 by entry dated February 6, 1906; to Northeast quarter (NE¼) of Southeast quarter (SE¼) of Section 8, Township 4 South, Range 14 East by entry dated February 6, 1906; and your orator shows unto your Honors that all of the said lands were subsequently conveyed to your orator and that said lands embrace the entire course of the Deschutes River between the North line of the Southwest quarter (SW¼) of Section 35, Township 3 South, Range 14 East and the South line of the Northeast quarter (NE¼) of the Southeast quarter (SE¼) of Section 8, Township 4 South, Range 14 East.

VII.

Your orator further showeth unto your Honors that after the entry of all the lands hereinbefore described, to-wit, on or about the 21st day of April, 1906, the North half (N½) of the Southwest quarter (SW¼) of Section 35 above described was temporarily withdrawn from any form of disposition whatever by an order of the General Land Office of the United States of America, but the same was restored to settlement on or about the 9th day of May, 1910, and to entry on or about the 8th day of June, 1910, but that prior to

the last mentioned date the Northwest quarter (NW¼) of the Southwest quarter (SW¼) of said Section 35 was withdrawn from any form of disposition whatever, under an order of the General Land Office of the United States made about the 18th day of March, 1910, and thereafter, by order of the President of the United States, made about the 2nd day of July, 1910, sanctioning the prior temporary withdrawal, in like manner the Southeast quarter (SE¼) of the Northwest quarter (NW¼) and the Northwest quarter (NW¼) of the Northeast quarter (NE¼) of Section 3, Township 4 South, Range 14 E. W. M., were similarly withdrawn by the Secretary of the Interior of the United States under an order dated about the 24th day of October, 1908, which withdrawal was changed to a temporary power withdrawal about the 30th day of December, 1909, which order was substantially in the following language, to-wit: "In aid of proposed legislation affecting the disposal of water power sites on the public domain, all public lands in the following list was temporarily withdrawn from all forms of entry, selection, disposal, settlement or location and all existing claims, fittings and entries are temporarily suspended. All valid entries heretofore made may proceed up to and including the submission of final proof, but no purchase money will be received or final certificate issued until further orders." But your orator showeth unto your Honors that it is informed and believes and therefore alleges that at the time the several orders above mentioned withdrawing the lands from entry, selection, disposal, settlement or location were made, the applica-

tion to select said lands was pending before the General Land Office of the United States of America, and the said lands in Section 35 and Section 3 selected were not vacant public lands of the United States and were not affected by the several orders or proclamations withdrawing the said lands from entry, and were not affected by the said orders or proclamations or by any thereof, and furthermore your orator showeth unto your Honors that until the act of Congress of June 25, 1910, there was no act of Congress under which the said lands could legally be withdrawn from settlement or entry or by which the rights acquired by entry of said lands could have been affected. And, furthermore, your orator showeth unto your Honors that at the time that said orders and proclamations withdrawing the said lands in Sections 3 and 35 from settlement and entry were made, the said Sherar or his heirs and assigns had acquired title to the Southeast quarter of Section 34, in Township 3 South, Range 14 E. W. M., and also to the Southeast quarter of the Northeast quarter the East half (E½) of the Southwest quarter (SW¼) and the West half (W½) of the Southeast quarter (SE¼) of Section 3, in Township 4 South, Range 14 E. W. M., and to the Northwest quarter (NW¼) of Section 10, and the Northwest quarter (NW¼) of the Southwest quarter of Section 10, in said Township 4 South, Range 14 E. W. M. and that the lands attempted to be withdrawn from settlement and from entry were not valuable for power purposes, as the lands above and below the lands so withdrawn from entry in Section 3 and situated along the Deschutes River were owned by the

said Sherar, his heirs and assigns, and the lands attempted to be withdrawn from entry for power purposes were not valuable for such purposes without the use of the lands which lay above said Section 35 on the Deschutes River and for which title had passed from the United States of America.

VIII.

Complainant further showeth unto your Honors that it is informed and believes and therefore alleges, that on or about the 27th day of July, 1906, the said J. H. Sherar, together with his wife for a valuable consideration to them paid by one J. C. Hostetler, entered into an agreement in writing wherein they agreed to sell to said Hostetler, his heirs, executors, administrators or assigns, if they should elect to purchase the same, all of the following described land, situated in Wasco County, Oregon, to-wit:

West half of the Southwest quarter of Section twenty-seven, the Southeast quarter of Section thirty-four, and the North half of the Southwest quarter of Section thirty-five, all in Township Three South, Range Fourteen East W. M. West half of the East half. South half of the Northwest quarter and the East half of Southwest quarter of Section Three, and the Northwest quarter, and the Northwest quarter of the Southwest quarter of Section Ten, all in Township Four South, Range Fourteen East W. M. For said consideration the further right and privilege is hereby given and granted to purchasing by the said J. C. Hostetler, his heirs, executors, administrators and assigns of all

right, title and interest that we or either of us now have or may acquire under the laws of the State of Oregon or otherwise of appropriating water from the Deschutes River for the purpose of furnishing electrical power for any and all purposes and all water rights connected with said stream of any kind that we or either of us may now have or hereafter acquire within the life of this option, and all right to condemn rights of way and riparian rights, and for said consideration the right and privilege is hereby conferred of purchasing all of the stock which we or either of us now own in the Tilkenny Road and Bridge Company, a corporation organized under the laws of the State of Oregon, and Tygh and Grass Valley Road Company, a corporation organized and existing under the laws of the State of Oregon, it being understood that the stock herein referred to amounts to ninety-nine shares in each company, and that thereafter the said right to purchase the said lands of said Sherar was duly assigned in writing by the said Hostetler for a valuable consideration, and the said right to purchase the said lands was thereafter and for a valuable consideration, on or about the 5th day of August, 1909, sold and assigned to your orator and became vested in your orator, and thereafter your orator, on or about the 4th day of December, 1909, exercised its right to purchase said lands and paid the consideration therefor agreed upon between your orator and the heirs of the said Sherar and the personal representatives and assigns of the said Sherar, and at or about the same time, and with intent to use said lands for the purpose of developing power thereon by means

of the water flowing through said lands in the channel of the Deschutes River, your orator further purchased and acquired title to certain other lands lying on said river and through which or a part of which the channel of said river flows, to-wit, the Southwest quarter (SW¼) of the Northeast quarter (NE¼) of Section 3, the Northwest quarter (NW¼) of the Southeast quarter (SE¼), the North half (N½) of the Southwest quarter (SW¼) and the Northeast quarter (NE¼) of the Southeast quarter (SE¼) of Section 9, in Township 4 South, Range 14 E. W. M., and the Northeast quarter (NE¼) of the Southeast quarter (SE¼) of Section 8, in said Township and Range, and your orator acquired title to all of said lands and paid the consideration therefor with the design and purpose of using said lands for the purpose of constructing, maintaining and operating thereon a plant to generate electrical power, and in furtherance of this design your orator employed engineers to make an examination and survey of the said lands and of the water power thereon and to prepare plans and specifications for constructing the plant which your orator intended and expected to erect upon said lands for the purposes aforesaid and employed said engineers both before and after your orator acquired the said right to purchase said lands and before and after the conveyance of said lands was made to your orator by the heirs and devisees of J. H. Sherar, deceased, and your orator expended large sums of money for this purpose.

IX.

Complainant further showeth unto your Honors that the defendant at all times from and after the 13th day of June, 1906, had notice of the terms of the instrument in writing whereby the said J. H. Sherar and wife granted to the said J. C. Hostetler the right to purchase the property in this bill of complaint described and of the purposes for which the said Hostetler contemplated the purchase thereof, and knew the rights of the said Hostetler and of his assigns, and knew that the said lands in this bill of complaint described were not vacant public lands of the United States. Thereafter, and with full knowledge of the purposes for which the right to purchase said lands had been given, and with a view to acquiring a right of way over said lands from the heirs and personal representatives and devisees of said J. H. Sherar and from the assigns of said J. H. Sherar, the defendant entered into negotiations with the executors of the will of J. H. Sherar and with the assigns of the said J. C. Hostetler and also entered into negotiations with the Interior Development Company, a corporation organized under the laws of the State of Oregon for the purpose of utilizing the waters of the Deschutes River on a part of the lands in this bill of complaint described for generating electrical power, and entered into said negotiations with a view to acquiring a right of way over lands described in this bill of complaint, and entered into said negotiations with the said parties prior to the time that it commenced to construct its railroad over the said lands and before the definite location of its proposed railroad over said lands had been determined upon or adopted.

At the time said negotiations were commenced, the Interior Development Company owned the Northeast quarter (NE¼) of the Southeast quarter (SE¼) of Section 9 above described, and also was claiming the Northeast quarter (NE¼) of the Northeast quarter (NE¼) of Section 3 above described; and one B. F. Laughlin was the owner of the option to purchase, executed by J. H. Sherar and wife to J. C. Hostetler; and your orator is informed and believes and therefore alleges that it was agreed between the Interior Development Company and the defendant that the defendant should have the right to go upon the lands owned by the Interior Development Company and the lands claimed by the Interior Development Company, as above set forth and construct its railroad over the same and upon the lands above said lands claimed and owned by the said Interior Development Company, provided that the railway line to be constructed over the said lands by the defendant should be constructed at such an elevation above the water of the Deschutes River that the construction and maintenance of the defendant's railway line should not interfere with construction and maintenance of a dam sixty (60) feet in height above ordinary low water in the said river where the said river runs through the Northeast quarter (NE¼) of the Northeast quarter (NE¼) of said Section 3 and above the falls of said river, and the defendant railway company agreed to so locate, construct and maintain its said railroad as to permit the construction, maintenance and enjoyment of a dam in the Deschutes River above

the falls thereof sixty (60) feet in height above ordinary low water in said river at said point.

Your orator further shows unto your Honors that it is informed and believes and therefore alleges that during said negotiations and before your orator purchased the Hostetler option from said Laughlin, it was agreed by and between the said Laughlin and the defendant railway company that the said defendant might enter upon the lands described in the contract between J. H. Sherar and wife and the said Hostetler, and locate and construct its railway line over the same, provided that the railway line should be so located, constructed and maintained over said lands and over the lands above and below said lands that a dam sixty (60) feet in height above ordinary low water in the Deschutes River might be constructed in the Deschutes River at any place on the lands in the said Hostetler option described, and provided that the defendant should also make full compensation for all lands taken and for all damages to the lands in the option described and that no right to build or construct or maintain a railway over said lands should be granted or acquired unless the railroad were located as above provided and unless and until full damages were paid and compensation made as above provided.

Your orator further shows unto your Honors that it is informed and believes and therefore alleges that after the purchase of the Hostetler contract by your orator, the negotiations between said Laughlin and the executors of the will of J. H. Sherar were continued by

the defendant, and the defendant was informed that the executors of said Sherar could not and would not grant a right of way over the lands in this bill of complaint described without the consent of your orator, but that afterwards, about the 25th day of August, 1909, the defendant requested of the Sherar executors permission to enter upon the lands in this bill of complaint described and to proceed with the grade of its railroad thereover, and was informed that such consent would not be given unless the consent of your orator should first be obtained, and that thereupon the defendant stated to the said executors that the consent of your orator had been obtained, but in truth and in fact the consent of your orator had not been obtained; and your orator is further informed and believes and therefore alleges that the said executors, through their attorneys, then informed the defendant that if it should construct, maintain and operate its railroad at such an elevation above the Deschutes River that the said railroad would not interfere with the use of the property in the Hostetler contract described for hydraulic purposes, and if your orator would consent thereto, that the defendant might proceed with the construction of its railroad, but not otherwise.

Your Orator further avers that it is informed and believes and therefore alleges that about the 25th day of August, 1909, for the purpose of confirming conversations had between the executors of the will of J. H. Sherar and their attorney, and the representatives of the defendant, the attorneys of the said executors advised the defendant that the executors of the will of

said Sherar would consent that the defendant company should proceed with the construction of its railroad over the Sherar lands in the Deschutes canyon provided that the railroad should be constructed sufficiently above the river that it would not interfere with the use of the property for hydraulic purposes and that the parties who had agreed to purchase the property should consent thereto, and furthermore that if the parties who had agreed to purchase should not take the Sherar property, that the defendant should pay to the estate of J. H. Sherar one thousand dollars ($1,000) for the right of way, but that if the sale should be consummated the defendant should settle with the purchasers for the right of way; and your orator avers that its consent to the location, construction and maintenance of the railroad over the said lands was never obtained, and no attempt was made to agree with your orator as to the compensation which it should receive for a right of way over said lands; and your orator further avers that at all of said times from and after the 5th day of August, 1909, the defendant knew that your orator had purchased the Hostetler contract, and knew that your orator was causing surveys to be made and plans and specifications to be drawn with a view to determining in what manner the hydraulic power could best be installed upon the Deschues River on the lands in this bill of complaint described, and was expending large sums of money to this end; and your orator is informed and believes and therefore alleges that at said times the defendant knew of the rights of your orator, and knew of the condition of the title of said lands in this bill of complaint described.

X.

Your orator shows unto your Honors that the lands in Section 35, the lands in Section 34, the lands in the Northeast quarter of the Northeast quarter of Section 3, the lands in the Southwest quarter of the Northeast quarter of Section 3, and the lands in the East half of the Southwest quarter of Section 3, the lands in Section 10, the lands in Section 9, the lands in Section 8 in this bill of complaint described, lie on both sides of the Deschutes River, and the lands in the Southeast quarter of the Northwest quarter of Section 3 and the East half of the Southeast quarter of Section 3 lie, the first described tract on the west side of said river, and the last described tract on the east side of said river, but both extending to the channel of said river; that through said lands in the bill of complaint described the Deschutes River runs in a narrow and deep canyon, and the lands in this bill of complaint described are chiefly valuable by reason of the fact that they lie on said river and that through said lands the fall in said river is very great, so that said lands taken together furnish an excellent site for hydraulic plant; and said facts were well known to the defendant at all times in this bill of complaint mentioned; and your orator and the said Laughlin and the Interior Development Company undertook to acquire title to said lands with the intent of developing the hydraulic power on said lands, and said fact was well known to the defendant; and your orator and also the Interior Development Company were at all the times that the acts of the defendant herein complained of were committed, engaged in surveying and examining said

lands and causing plans and designs to be prepared and work to be done with a view to construct and install on said lands a plant for the generation of power for manufacturing purposes and for sale, and these facts were well known to the defendant at the time that the acts herein complained of were committed by the defendant, and the negotiations had by the defendant with the said Laughlin, the executors of the will of J. H. Sherar, and Interior Development Company were had with full knowledge on the part of the defendant of said facts and with a view to so locate a line of railway that the construction, maintainance and operation of such railway by the defendant should not interfere with the development of power for said purposes on said river on the lands in this bill of complaint described, and the defendant agreed to so locate, construct, maintain and operate its railroad as not to interfere with the development of power on said river on the lands above described.

XI.

Notwithstanding the rights of your orator, and in violation of the agreement which it had made with the executors of the will of J. H. Sherar and with B. F. Laughlin and with the Interior Development Company and without authority from your orator, and without right other than as stated in this bill of complaint, but by and with the consent of the executors of the said J. H. Sherar fraudulently obtained as hereinbefore set forth, and by and with the consent of the said Laughlin and by and with the consent of the Interior Development Company but by and with such consent obtained with

the agreement on the part of the defendant to so locate its line of railway as not to interfere with the development of power on the lands in this bill of complaint described as in this bill is set forth by your orator, the defendant entered upon the lands in the bill of complaint described and at the time of the commencement of this suit was upon said lands and was engaged on the construction of a railway over and across said lands, but located and constructed its railway over said lands in violation of the agreement made with the executors of said J. H. Sherar and with said Laughlin and with said Interior Development Company at an elevation above the Deschutes River which will admit of the construction of a dam on said river, and particularly where said river flows through the northwest quarter of the northeast quarter of section 3 and above the falls in said river not exceeding fifty-five (55) feet above ordinary low water, and was engaged in constructing its said railroad over the said lands in the bill of complaint described, on said elevation, at the time of the commencement of this suit, and since the commencement of this suit has completed the construction of its said railroad over said lands notwithstanding the pendency of this suit and the objections made by your orator, and has not made or attempted to make any agreement with your orator as to the compensation to be paid your orator for a right of way over said lands or as to the elevation at which said railway should be constructed over said lands, and had not, until the bringing in of its answer in this suit, offered to pay to your orator any sum of money as compensation; and while it is true that the executors of J.

H. Sherar and the said Laughlin and the Interior Development Company and the engineers of your orator knew that the defendant had entered upon said lands and was constructing a railroad over the same, and while it is true that the said parties did not attempt, nor did your orator attempt until the bringing of this suit, to prevent the entry upon the said lands by the defendant, or the construction of the said railway over said lands by the defendant, it is also true that the said Laughlin and the said Interior Development Company and the executors of J. H. Sherar were informed by the defendant that the railroad was being constructed in such manner as to permit the erection and maintenance by the owner of the lands described in the bill of complaint of a dam on the Deschutes River where the same flows through the northwest quarter of the northeast quarter of section 3, and above the falls of said river, sixty (60) feet in height above ordinary low water of said river, and that your orator had consented thereto; and the executors of said J. H. Sherar, the said Laughlin, the Interior Development Company, and the engineers of your orator believed the representations made by the defendant until about the time of the commencement of this suit, and on that account did not protest against the entry upon said lands by the defendant or the construction of said railway, or take any steps to prevent the same; and at the same time your orator was informed and believed and therefore alleges that no right had been granted to the defendant to build its railway over said lands, and that no right would be granted to the defendant to build a railway over said lands without the

consent of your orator, but your orator had not acquired title to said lands and therefore had no right to inhibit the entry upon said lands by the defendant or the construction of the said railway over said lands by the defendant, until on or about the 30th day of March, 1910, when the deeds of conveyance of said lands were delivered to your orator and your orator put in possession thereof, and thereupon your orator promptly undertook to prevent the further trespass upon said lands by the defendant and the construction of the railroad over said lands by the defendant, and has at all times since vigorously undertaken to prevent the defendant from acquiring any rights over said lands until compensation should first be ascertained and paid to your orator.

XII.

Your orator further showeth unto your Honors that the construction, maintenance and operation of the railroad over the lands in this bill of complaint described by the defendant, if the same be maintained and operated upon the location upon which the same has now been located and constructed, and as now being operated, will prevent the building of a dam in the Deschutes River on the lands in the bill of complaint described at any point to a height exceeding fifty-five (55) feet above ordinary low water in said river, and the power which your orator will be able to generate by means of the water of the Deschutes River on its lands will be greatly impaired, and the cost of generating said power will be greatly enchanced, and the cost of constructing a plant will be greatly increased, and the maintenance

and operation of the plant, when completed, will be greatly obstructed and imperiled.

XIII.

Your orator further showeth unto your Honors that about the first day of December, 1909, and about the same time when it exercised its option to purchase the rights of the executors, heirs at law, devisees and assigns of J. H. Sherar, it also and at large expense purchased all the rights of the Interior Development Company upon the Deschutes River and particularly its interest in all lands lying on said river, and also purchased from others the right to flow lands owned by them upon the Deschutes River, and now owns all rights of the Interior Development Company and particularly all the capital stock of the Interior Development Company, and that it made such purchase with the intent and for the purpose of erecting, maintaining and operating a plant for the generation of power on the lands in the bill of complaint described; and your orator further shows that when it made said purchase from the Interior Development Company and from said Laughlin it was informed and believed and it therfore alleges that the defendant had agreed that its railroad should be so located, constructed, maintained and operated as not to interfere with the development of power on the lands in the bill of complaint described, and that the railroad was so located by the defendant that a dam at least sixty (60) feet in height above ordinary low water in the Deschutes River where the same flows through the northwest quarter of the northeast quarter of section 3, and above

the falls in said river, could be constructed and maintained without being interfered with by the railroad of the defendant, and that under its purchase it would have a right to construct and maintain a dam at said point and of such elevation without interference therewith by the defendant; and your orator further shows that it was informed and believed and is informed and does believe and therefore avers, that all rights of way acquired by the defendant for the construction, maintenance and operation of its railroad on the Deschutes River on lands other than those in the bill of complaint described, were acquired by the defendant to the end that a dam sixty (60) feet in height at the point in section 3 hereinbefore described, might be constructed and maintained without interference with any of the rights acquired by the defendant over lands other than those in the bill of complaint described, and were acquired in pursuance of the agreement had between the Interior Development Company and the defendant and in pursuance of the agreement had between the said Laughlin and the defendant and in pursuance of the agreement fraudulently entered into by the defendant with the executors of the will of J. H. Sherar, and that by reason of the matters herein alleged the defendant is estopped and should not be heard to say that the erection of a dam sixty (60) feet in height above ordinary low water on the Deschutes River at the point in section 3, above the falls in said river, in this bill of complaint described, would flow any of the lands of the defendant, or would interfere with the construction, maintenance or operation of the railroad of the defend-

ant on any lands lying above the lands in the bill of complaint described, or with any of the lands in the bill of complaint described. And complainant further avers that it is informed and believes and therefore alleges that in truth and in fact the erection of a dam sixty (60) feet in height above ordinary low water on the Deschutes River at a point in section 3, above the falls in said river, at or near the place described in this bill of complaint, would not cause the waters of said river to flow any lands of the defendant or interfere with the construction, maintenance or operation of the railroad of the defendant on any lands lying above the lands in this bill of complaint described.

XIV.

Your orator further shows unto your Honors that your orator, at the time of the filing of its bill of complaint in this cause, was and ever since has been the owner in fee of the Southeast quarter of Section 34, Township 3 South, Range 14 E. W. M., and of the West half of the Southwest quarter of Section 27 in said Township and Range, and of the Northwest quarter of the Northeast quarter of Section 34 in said Township and Range, and of the East half of the Southwest quarter and the West half of the Southeast quarter of Section 3 in Township 4 South, Range 14 E. W. M., and of the Southwest quarter of the Northeast quarter of said Section 3, also of the Northwest quarter of Section 10, the Northwest quarter of the Southwest quarter of Section 10, the Northwest quarter (NW¼) of the Southeast quarter (SE¼) of Section 9, the North half

(N½) of the Southwest quarter (SW¼) of Section 9, the Northeast quarter (NE¼) of the Southeast quarter (SE¼) of Section 9 and the Northeast quarter (NE¼) of the Southeast quarter (SE¼) of Section 8 in said Township and Range, and by reason of the facts herein alleged was at said time, and has at all times since been, in possession of and entitled to claim a patent for the North half (N½) of the Southwest quarter (SW¼) of Section 35, in Township 3 South, Range 14 E. W. M., and for the Southwest quarter (SW¼) of the Northwest quarter (NW¼) of Section 3, and Lot 2, the same being the Northwest quarter (NW¼) of the Northeast quarter (NE¼) of Section 3, in Township 4 South, Range 14 E. W. M., that said lands lie in the canyon of the Deschutes River, with steep and in many places precipitous banks and bluffs along said river, and are valuable chiefly for the power which may be generated by damming said river and by the water flowing from said river upon said lands; that on said lands the fall in said river is very great, so that the fall of said river between the lands of your orator in Section 34 above described, and the lands of your orator in Section 8 above described, is approximately ..... feet, and that at one point on said river on said Lot 2 of Section 3, there is a fall or falls in said river approximately ..... feet in height; that said lands were acquired by your orator for the purpose of developing power upon said lands, and the purchase price thereof was paid by your orator and your orator paid, as the purchase price thereof, more than the sum of fifty thousand dollars ($50,000), and said lands were

purchased by your orator and the purchase price thereof paid after your orator had been assured by the defendant that its line of railroad across said lands had been so located and would be so constructed and maintained as not to interfere with the erection of a dam sixty (60) feet in height above ordinary low water in the said river where the same flows through said Lot 2 in said Section 3 and after your orator had been advised of the understanding between the defendant and said Laughlin; and your orator, relying upon the representations of the defendant that its railroad had been so located and would be so constructed, maintained and operated as not to interfere with the erection of a dam as herein stated, and also upon the understanding between the defendant and said Laughlin, purchased all other lands lying along said river above the proposed site of said dam, which, as your orator was informed and advised and therefore believes, would be flowed or flooded by the waters of said river should a dam of said height be constructed and maintained in said river where the same flows through said Lot 2 is said Section 3, and among other lands so purchased your orator purchased in particular lands in Sections 9 and 10 above described; and your orator avers that all of said matters were well known to the defendant at and prior to the time that the defendant located its line of railroad over the lands of your orator in this bill of complaint described and over the lands lying above said lands of your orator, and that defendant is estopped and should not be heard to say by reason of the matters herein alleged that any of its lands would be interfered with or flowed or flooded,

or that the construction or maintenance or operation of its railroad would be interfered with, by the construction of a dam in said river where the same flows through the lands in Lot 2 above described.

XV.

Your orator further shows unto your Honors that it is informed and believes and therefore alleges that the defendant pretends and claims that it has acquired a right of way over the lands in the north half of the southwest quarter of section 35 hereinbefore described, and in Lot 2, the same being the northwest quarter of the northeast quarter of section 3, and in the southeast quarter of the northwest quarter of section 3 above described, under and in pursuance of the Act of Congress of the United States of March 3, 1875, entitled "An Act granting to railroads a right of way through public lands of the United States;" but your orator alleges that the said lands were not at the time that the defendant attempted to acquire a right of way over the same, in pursuance of said Act of Congress of March 3, 1875, public lands of the United States or vacant lands of the United States, but were at said time and have been since the year 1871, in the possession and occupancy of J. H. Sherar, his heirs, devisees and assigns, and that the attempt on the part of the defendant to acquire a right of way over the same as public lands of the United States was and is void and that thereby the defendant acquired no right of way or interest in the said lands or any thereof.

XVI.

Your orator further shows unto your Honors that it is informed and believes and therefore alleges that the defendant pretends and claims that it has acquired a strip of land one hundred (100) feet in width, being fifty (50) feet on each side of the center line of the location of its railroad over and across the southeast quarter of the northwest quarter of section 9, the northeast quarter of the southeast quarter of section 17, the west half of the southwest quarter of section 16, the west half of the northwest quarter of section 21, the northeast quarter of the northeast quarter of section 20, the northeast quarter of the southeast quarter of section 20, and the southwest quarter of the northeast quarter of section 32, all in township 4 south, range 14 E. W. M., and that it has also acquired from the United States under and in pursuance of the Act of Congress of the United States of March 3, 1875, hereinbefore referred to, a right of way one hundred (100) feet in width on either side of the center line of location of its railroad over said other public lands of the United States which lie along the Deschutes River, and particularly over the south half of the southeast quarter and the southwest quarter of the southwest quarter of section 9, the east half of the northeast quarter and the northeast quarter of the northeast quarter and the west half of the southeast quarter of section 20, the west half of the northeast quarter and the west half of the southeast quarter of section 29, the northwest quarter of the northeast quarter and the southeast quarter of the northeast quarter of section 32, the southwest quarter of the northwest

quarter and the west half of the southwest quarter of section 33, all in township 4 south, range 14 E. W. M., and that said lands are necessary to it for its railroad, and that its railroad has been located over the same, and that the erection of a dam in said river at the point where said river flows through said Lot 2 above described, will flow the waters of said river back upon the said lands acquired by it for railway purposes and back upon the right of way over the public lands above described, over which the defendant claims to have acquired a right of way; but your orator avers that it is informed and believes and therefore alleges that the said river does not flow through or upon the southeast quarter of the northwest quarter of section 9, or upon the south half of the southeast quarter or the southwest quarter of the southwest quarter of section 9, but flows through the northwest quarter of the southeast quarter of section 9 and the northeast quarter of the southeast quarter of section 9, and the north half of the southwest quarter of section 9, and through the northeast quarter of the southeast quarter of section 8, the lands hereinbefore described and alleged to have been purchased by and to be now owned by your orator and that it is informed and believes and therefore alleges that the erection of a dam sixty (60) feet in height above ordinary low water in the Deschutes River where the same flows through Lot 2 in this bill of complaint described, would not cause the waters of said river to flow over or upon any of the lands claimed by the defendant in sections 9, 17, 16, 21, 20, 32 or 29, nor affect the flow of the waters of said river upon said lands or upon any

thereof; and furthermore that if the location of said dam at said place should cause the waters of said river to flow upon any of said lands claimed by the defendant as herein set forth, such flooding would not affect the railroad lines of the defendant as located over or upon said lands, or any thereof, and that this is well known to the defendant and was known to the defendant at the time it located its railroad line over the same, and that its railroad line was located over said lands with the intent to place the same at such elevation above said river that the erection of a dam of said height at the point aforesaid would not affect or impair or interfere with the railroad line of the defendant where the same is located over or upon said lands, or any thereof, and that said location over the said lands was so made by the defendant with this end in view in pursuance of the agreement entered into between the defendant and the Interior Development Company and B. F. Laughlin hereinbefore mentioned, and in consideration that the said defendant should be allowed to locate its railroad over the lands then claimed by the said Interior Development Company and over the lands then claimed by the said B. F. Laughlin under the option to purchase the same hereinbefore mentioned, at such an elevation above the waters of said river that a dam of the height hereinbefore mentioned might be constructed and maintained in the said river where the same flows through Lot 2 hereinabove described; and that the defendant is estopped and should not be heard to say that the erection of a dam of said height at said place would interfere with its railroad where the same is located over the said lands, or any thereof.

XVII.

Notwithstanding the rights of your orator and its ownership and interest in the lands in this bill of complaint described, as herein alleged, and against the protest of your orator, the defendant entered upon the lands belonging to your orator and claimed by your orator as in this bill of complaint set forth, and at the time of the commencement of this suit was engaged in the construction of a railroad over and across said lands, and was constructing said railroad at such an elevation above the said Deschutes River that a dam sixty (60) feet in height above ordinary low water in said river where said river flows through Lot 2 in section 3, township 4 south, range 14 E. W. M., would cause the waters of said river to back and flow the railroad line of the defendant as the same was being constructed over the lands owned and claimed by your orator in section 3 and in section 10 and in section 9 aforesaid, and at such an elevation above the water of said river that any dam erected in said river where the same flows through said Lot 2, exceeding fifty-five (55) feet in height, could not be constructed without flooding the line of railroad through the said lands of your orator; and prior to the time that your orator acquired title to said lands, and prior to the time that the defendant commenced the construction of said railroad, the defendant was warned by the then owners of said lands and by your orator, then having acquired the option to purchase said lands, to desist from its work, and in particular the defendant was advised on and prior to the 25th day of August, 1909, that the defendant would be permitted to pro-

ceed with the construction of its railroad across that portion of the lands in this bill of complaint described acquired by your orator through the option given by J. H. Sherar, provided the said railroad should be constructed sufficiently above the water in said Deschutes River so that it would not interfere with the use of the property for hydraulic purposes, and in particular was further advised by the executors and heirs at law and devisees of J. H. Sherar, on and prior to the 25th day of August, 1909, that the defendant could proceed with the construction of its railroad across the lands belonging to the estate of J. H. Sherar, only on condition that the railroad should be constructed sufficiently above the river that it would not interfere with the use of the said property for hydraulic purposes, and on condition that the persons who had agreed to purchase the property should consent, and that if the persons who had agreed to purchase the property should take the property and the proposed sale should be consummated the defendant should settle with such purchasers for the right of way over said lands; that at said time the said railroad had not been constructed, or the construction thereof begun, over said lands in this bill of complaint described and herein alleged to be owned by or claimed by your orator, and your orator further shows that your orator has not, and, as your orator is informed and believes and therefore alleges, the executors and heirs and devisees of J. H. Sherar have not, and the said B. F. Laughlin and the Interior Development Company have not, nor has any of said parties, as your orator is informed and believes and therefore alleges, consented to or given per-

mission that the defendant should locate or build a railroad over the said lands, or any thereof, as such railroad is located and constructed over the same; and your orator therefore alleges that the said railroad was located and constructed over the said lands and is now maintained and operated over said lands without the consent or permission of the owners of said lands or any thereof, and notwithstanding the objections and protests of the owners of said lands and particularly of your orator, but your orator did not discover the true elevation at which said railroad was being constructed until after the 30th day of March, 1910, nor until after the deeds conveying said property to your orator had been executed and delivered to your orator, but your orator was deceived and your orator is informed and believes and therefore alleges that the executors, devisees and heirs at law of J. H. Sherar and the said B. F. Laughlin and the said Interior Development Company were deceived and each of them was deceived, by the representations of the defendant and were led to believe and did believe that the railroad which the defendant contemplated constructing, maintaining and operating over said lands would be located, constructed and maintained and operated at such an elevation above the waters of the Deschutes River that a dam sixty (60) feet in height above ordinary low water where said river flows through the lands in Lot 2 above described, could be built and maintained without interfering with the construction, maintenance and operation of said railroad, and by reason of such deception and the representations of the defendant by which such deception was

accomplished, the executors, heirs at law and devisees of said J. H. Sherar, the said Laughlin and the said Interior Development Company and your orator did not take any steps to prevent the location of said railroad by the defendant or the construction of the same as located.

XVIII.

Your orator further shows unto your Honors that at the time the defendant located its said railroad, and at all times since said time, the defendant has known and now knows that the lands in this bill of complaint described and herein alleged to be owned by or claimed by your orator, are valuable chiefly because of the fact that the said Deschutes River flows through the same and in its course through said lands the flow of said river is so great that the water of said river can be advantageously used for the development of power, that prior to the organization of the defendant the said J. H. Sherar had agreed to sell said lands to parties who were purchasing the same for the purpose of developing power on said lands, and had entered into a written contract to that end, and that the right to purchase the said property has been acquired for said purpose by the said Laughlin, and afterward by your orator; and also was advised and knew that the Interior Development Company had attempted to appropriate the water of the Deschutes River where the same flows through Lot 2 above described, for the purpose of erecting in said river at said place a dam 60 feet in height above the ordinary low water of said river for the purpose of developing

power thereby; but, notwithstanding such knowledge on the part of the defendant and the representations of the defendant that it would so locate and construct its railroad as not to interfere with the use of said property for hydraulic purposes and with the work of constructing and installing a power plant on said river, the defendant entered upon said lands and at the time this suit was commenced was engaged in constructing its railroad over the same, and your orator shows that the location, construction and maintenance of the railroad of the defendant over the lands in this bill of complaint described, and therein alleged to be owned or claimed by your orator, has greatly hindered and delayed your orator in the prosecution of the work of constructing and installing a power plant on said river on said lands, and will greatly hinder and delay your orator in the prosecution of said work, and after said work of constructing and installing said power plant has been completed the said power plant will be greatly interfered with and impaired by slides caused by the building of said railroad and by the maintenance and operation of said railroad; and furthermore, the power to be developed upon said lands and which your orator contemplates and has been engaged in developing upon said lands, will be greatly curtailed and impaired, and your orator will thereby be irremediably injured and damaged; and your orator is informed and believes and therefore alleges that the construction, maintenance and operation of defendant's railroad over said lands will enhance the expense of constructing the power plant on said lands by your orator in a sum exceeding ..... dollars

($.....); that the amount of power which can be developed upon said lands by the construction of a dam in said river where the same flows through lot 2 in section 3 above described, will be impaired to the extent of ..... per cent. of the total power which could be generated by said dam should such dam be erected sixty (60) feet in height above ordinary low water in said river, and that the cost of the power developed by the plant to be erected on said river on said lands by your orator will be increased to the extent of ..... dollars ($.....) per horsepower; and your orator shows that by reason of the premises the damages sustained by your orator by reason of the location of the railroad of the defendant over its said lands, as the same has been located and constructed and as now maintained and operated, will be in excess of ..... dollars ($.....), and that the amount involved in this controversy is more than two thousand dollars ($2,000) exclusive of interest and costs;

XIX.

Your orator further shows unto your Honors that it has at all times since it acquired the right to purchase the said lands, maintained agents in the State of Oregon, who were authorized to agree with the defendant as to the terms and conditions upon which the defendant should enter upon said lands, locate its railroad over the same, and construct and build its railroad thereover and acquire a right of way over said lands, and as to the compensation which should be paid therefor, but that at no time did the defendant attempt to enter into any agree-

ment with your orator or with the owners of said lands, or any thereof, as to the compensation to be paid for the right to locate and build its railroad over said lands, and at no time has any compensation or damages been tendered to your orator or to anyone for the taking of or injury to your orator's property, and that at no time has the defendant attempted to purchase the right to enter upon, locate its railroad over, or construct its railroad over said lands, or any thereof, nor had the defendant commenced any action or suit in any court to appropriate the said lands or the right of way over the same, nor made any other attempt to acquire the right to go upon the same or to locate its railroad over the same, or to construct or maintain its railroad over the same, save as in this bill of complaint is more particularly set forth.

XX.

Plaintiff further shows unto your Honors that under the laws of the State of Oregon the defendant has a right to take and appropriate property for its corporate purposes, and means are provided whereby the defendant may exercise such right, but that no means are provided by law by which your orator can institute any proceedings to determine upon what conditions and for what compensation its lands and rights may be taken, and that your orator has no plain, adequate or speedy remedy at law, and is unable, by reason of the matters herein alleged, to prevent, without the assistance of a court of equity, the injuries and damages herein complained of, or to protect its property from the unlawful acts of the defendant, or to obtain compensation for its

property taken and the invasion of its rights, and must therefore seek relief in equity, wherein such matters are properly cognizable and relievable.

XXI.

Your orator further shows unto your Honors that since the commencement of this suit, and in pursuance of the decision of the General Land Office of the United States, patents have been issued pursuant to law upon the application to select the lands above described situated in Section 35 and also the Northwest quarter (NW¼) of the Northeast quarter (NE¼) of Section 3 above described, and thereby the legal title to said lands became vested in your orator and your orator is now the owner in fee simple of said lands.

XXII.

Your orator further shows to your honors that since the filing of the original bill of complaint in this suit, the Deschutes Railroad Company, in total disregard of the rights of your orator, has completed its railroad over the lands in this bill of complaint described and is now maintaining and operating its railroad over the said lands, and in connection therewith, has caused a fence to be built over the aforesaid lands and along the line of its railroad, as the same is located and constructed and maintained over the said lands in such manner that a large part of said lands are wholly separated, by the fences so constructed, from access to the Deschutes River, and unless enjoined by your Honors, will con-

tinue to maintain the said fences and to maintain and operate the said railroad over the lands of your orator.

Inasmuch, therefore, as your orator is remediless in the premises at and by the strict rules of the common law, and is only relievable in a court of equity, wherein matters of this kind are properly cognizable and relievable, your orator prays the aid of this Honorable Court that a writ of injunction issue out of and under the seal of this Court and be issued by one of your Honors according to the form of the statute in such cases made and provided, commanding, enjoining, restraining and prohibiting the defendant and each and all of the servants, agents, employes and attorneys of the defendant, and all persons acting by and through the authority or the direction of the defendant, from entering upon or trespassing upon the lands of your orator above described, or the lands claimed by your orator in this bill of complaint described, or any thereof, and from constructing, maintaining, building or operating a railroad over the same and from interfering with the possession of your orator or the enjoyment of said lands by your orator pending the determination of this suit; and that upon the final hearing of this cause such injunction be made perpetual; and that your orator may have such further and other relief in the premises as the nature and circumstances of this cause may require and as to your Honors may seem meet; and that it may please your Honors to grant unto your orator a subpoena of the United States of America isued out of and under the seal of this Honorable Court, directed to the defendant herein, and thereby commanding the defendant for a day certain, therein

to be named and under a certain penalty, to be and appear before this Honorable Court, then and there to answer, but not under oath (an answer under oath being expressly waived) all and singular the premises, and stand to perform and abide by such order and direction and decree as may be made against the defendant in the premises and as shall seem meet and agreeable to equity and to good conscience; and your orator, as in duty bound, will ever pray, etc.

VEAZIE, McCOURT & VEAZIE,
TEAL, MINOR & WINFREE,
Solicitors for Complainant.

The United States of America,
District of Oregon,—ss.

I, Walter J. Burns, being first duly sworn, depose and say: That I am Manager of Bulfour, Guthrie & Company, Agents for the State of Oregon of the Eastern Oregon Land Company, the above named plaintiff; that I have read the foregoing amended Bill of Complaint and know the contents thereof; and that the same is true as I verily believe.

WALTER J. BURNS.

Subscribed and sworn to before me this 7th day of November, 1913.

A. L. VEAZIE,
Notary Public for Oregon.

(Notarial Seal)

Service of the within Amended Complaint and receipt of a copy is hereby admitted this 12th day of November, 191..

A. C. SPENCER,
Of Attorneys for Defendant.

Filed November 12, 1913.

A. M. CANNON, Clerk.

And afterwards, to-wit: on the 29th day of December, 1913, there was duly filed in said Court and cause an answer to Second Amended Bill of Complaint in words and figures as follows, to-wit:

ANSWER TO SECOND AMENDED COMPLAINT.

Comes now the defendant and brings this its answer to complainant's second amended bill of complaint, to-wit, that amended bill filed on November 12, 1913, and thereupon, as and for such answer to so much of said amended bill as the defendant is advised by counsel is necessary or material to make answer unto, the defendant showeth:

The defendant admits that the complainant is a corporation organized under and by virtue of the laws of the state of California, and having its principal office and place of business in the city of San Francisco, state of California, and is a citizen of said state as in the said amended bill alleged; but this defendant has no knowledge or information sufficient to form a belief as to

whether or not in or by the complainant's articles of incorporation or amendments thereof, complainant is organized for the purpose of, or has any power to purchase, or sell, or exchange, or lease, or mortgage, or pledge, or hold, or enjoy, or encumber, or deal in, lands or water rights, or water privileges, or interests in lands, or water-rights, or water privileges of any nature or kind whatsoever, situated in the state of Oregon or elsewhere, or to engage in, or carry on, the business of dealing or operating in real estate, or to acquire, or own, or purchase, or sell or encumber, or hold, or enjoy, or dispose of, water for any purpose whatever, or to appropriate or use waters of the rivers, or streams, or lakes in the state of Oregon or elsewhere for any purpose whatever; or has power to appropriate lands, or water-rights, or other property for public or other or any use, or for the uses or purposes for which it was incorporated, and this defendant therefore denies the same and leaves to complainant such proof thereof as complainant may be advised to be necessary.

This defendant denies that in the year 1871, or at any time, J. H. Sherar purchased of a settler upon the public lands of the state of Oregon the possessory or any right to a strip of land extending on both or either side of the Deschutes river, from the mouth of Buckhollow on the north to the mouth of White river on the south, or made settlement upon said land in 1871, or at all, but admits that said land in 1871 was public lands of the United States and unsurveyed, and thereunto this defendant alleges that any purported purchase of any possessory right by the said Sherar of a settler on the public lands

of the United States was null and void, unauthorized by any statute of the United States, and expressly prohibited and declared void by the laws of the United States in effect at said time, and said Sherar acquired no interest whatever in any of the lands in question by virtue of any such alleged purchase.

This defendant denies that Sherar settled upon said lands with the intention of acquiring title thereto from the United States of America, under or in pursuance of laws theretofore or at all passed by the Congress of the United States at said or any time in force regulating the disposition or sale of the public lands of the United States.

This defendant has no knowledge or information sufficient to form a belief as to whether or not at the time of the said alleged purchase by the said Sherar, or of the said alleged settlement of the said Sherar upon said lands, there was a toll bridge crossing the Deschutes river on said lands, or toll roads leading from said bridge on either side of said river, or whether or not said Sherar purchased said toll bridge or toll roads, or built his residence upon lands near said bridge, and therefore denies the same, and leaves the complainant to such proof thereof as he may be advised is necessary. And this defendant denies that the said Sherar resided upon said lands in the year 1908, but admits that said Sherar at the time of his death resided at or near a bridge across the Des Chutes river, but that said residence occupied but a small portion of the land between Buckhollow and White River, and said residence was located in the south-

east quarter of section 34, township 3 south, range 14 east, W. M., and the occupancy and residence at such point was insufficient to acquire more than one hundred and sixty acres of the public lands of the United States, and did not and could not constitute a settlement upon or occupancy of more than one hundred and sixty acres, and such residence upon said southeast quarter of said section 34, this defendant is informed and believes, and therefore alleges, was for the purpose and use by said Sherar for the acquirement of the said southeast quarter of said section 34, township 3 south, range 14 east, W. M., and was exhausted upon the acquirement by said Sherar of said section 34, and did not and could not relate to, or be used as the basis for the acquirement of any property along the Deschutes river outside of said southeast quarter of said section 34.

This defendant denies that from the time of such alleged settlement of said Sherar to the date of his alleged death in 1908, said Sherar was in the exclusive or any occupancy of any of said lands except the southeast quarter of said section 34, or that any of said lands outside of said southeast quarter of said section 34, were generally or at all recognized as belonging to or were claimed by the said Sherar or were used by the said Sherar for the purposes for which they were best adapted, or for any purpose whatsoever.

This defendant alleges that the public surveys of townships three and four south, range 14 east, W. M., were completed and approved, and copies thereof filed with the Local Land Office of the United States at The

Dalles, Oregon, prior to the year 1883, and that no entry, of any of the lands referred to in complainant's complaint, except the southeast quarter of section 34, township 3 south, range 14 east, was ever made by said J. H. Sherar within three months after the filing of copies of said public survey in the Local Land Office of the United States at The Dalles, Oregon, the same being the district in which the said lands in question lie, and no proof or payments for any of said lands, except the said southeast quarter of section 34, was ever made to the United States, and any rights claimed by the said Sherar were cancelled and forfeited, and the said Sherar had no rights in any of said lands except the said southeast quarter of section 34 by reason of any settlement or occupancy of any of said lands.

This defendant denies that subsequently or at all, title to certain portions of said lands described in complainant's complaint was acquired from the United States of America in pursuance of the laws of the acts of Congress or otherwise at various or any times except as hereinafter admitted.

This defendant admits that the complainant is the owner of, and acquired title to, the southeast quarter of section 34, township 3 south, range 14 east, W. M. the southwest quarter of the northeast quarter, the west half of the southeast quarter, and the east half of the southwest quarter of section 3, the northwest quarter and the northwest quarter of the southwest quarter of section 10, all in township 4 south, range 14 east, W. M., and that this defendant has located thereover and across

said several lands its line of railroad as hereinafter more particularly set forth.

This defendant alleges that title to the north half of the southwest quarter of section 35, township 3 south, range 14 east, and lot 2 of section 3, township 4 south, range 14 east the same being the northwest quarter of the northeast quarter of said section 3, was selected by the Santa Fe Pacific Railroad Company, by J. H. Sherar, its attorney in fact, in lieu of other lands owned by the said Santa Fe Pacific Railroad Company, included within a forest reservation, which said lieu selection was made under and by virtue of the act of Congress, approved June 4, 1897, entitled "An Act making appropriation for sundry civil expenses of the government for the fiscal year ending June 30, 1898," but that said selection was not approved or patent issued therefor until February 26, 1913; that prior to such approval and the issuance of such patent, the Deschutes Railroad Company had located and constructed its line of railroad over and across the said lands, and had acquired a right of way over and across said lands as hereinafter more particularly alleged, and the approval and patent of said selection by the said Santa Fe Pacific Railroad Company, and the title granted by the United States to said land was made subject to the right of way of the Deschutes Railroad Company over and across said lands.

This defendant has no knowledge or information sufficient to form a belief as to whether or not said Sherar or the complainant ever acquired any title to

lot 1, section 3, the same being the northeast quarter of the northeast quarter of section 3, or the northeast quarter of the southeast quarter of section 9, township 4 south, range 14 east, W. M., but alleges that any title acquired in and to said lands by the said Sherar or the complainant was acquired subsequently to the location and construction of the line of railroad of the defendant over and across said lands; that at the time of the location and construction of the line of the Deschutes Railroad Company, over and across the same, said lands were owned by the Interior Development Company, and the defendant entered upon and constructed its line over and across the same, with the consent, permission and authority of the said Interior Development Company, and any title in and to the same acquired by the complainant or the said Sherar was acquired subject to the right of way of the defendant, and subject to the right of the defendant to occupy and use its line of railroad as now constructed.

This defendant alleges that it has no knowledge or information sufficient to form a belief as to whether or not title to the southeast quarter of the northwest quarter, section 3, the northwest quarter of the southeast quarter, the northwest quarter of the southwest quarter, or the northeast quarter of the southwest quarter of section 9, township 4 south, range 14 east, W. M., or the northeast quarter of the southeast quarter of section 8, township 4 south, range 14 east, W. M., was ever acquired by the complainant or the said Sherar, and therefore denies the same, but with reference thereto this defendant alleges that its line of railroad is not

constructed over or across any of said lands, and alleges that the same are immaterial to this controversy.

This defendant denies that all or any of said lands were subsequently or at all conveyed to complainant, except as hereinabove expressly admitted, or that said lands embrace the entire course of the Deschutes River between the north line of the southwest quarter of section 3, township 3 south, range 14 east, and the south line of the northeast quarter of the southeast quarter of section 8, township 4 south, range 14 east.

This defendant has no knowledge or information sufficient to form a belief as to whether or not at the time of the several orders of withdrawal referred to in paragraph VII of the Second Amended complaint, the application to select said lands or any thereof, was pending before the General Land Office of the United States, and therefore denies the same, and leaves the plaintiff to such proof thereof as may be necessary.

This defendant denies that the said lands in section 35 and section 3 selected, were not vacant public lands of the United States, and denies that the same were not affected by the several orders or proclamations withdrawing the said lands from entry, or were not affected by the said orders or proclamations, or by any thereof, and denies that until the act of Congress of June 25, 1910, there was no act of Congress under which said lands could legally be withdrawn from settlement or entry, or by which the alleged rights attempted to be acquired by the application to select said lands or the entry thereof could have been affected, but alleges that

said lands were withdrawn from entry and sale under and by virtue of the act of Congress approved June 17, 1902, entitled "An Act to appropriate receipts from sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands," and that said several withdrawals were for the purpose of such irrigation works as provided in said statute, and the said several orders of withdrawal specified that said withdrawals were for such purpose; that said act and the said withdrawals under the same were valid, binding, and subsisting, and effectually withdrew said lands from entry, selection, disposal, settlement, or location.

This defendant admits that prior to such withdrawal said Sherar had acquired title to the southeast quarter of section 34, township 3 south, range 14 east, the southeast quarter of the northeast quarter, the east half of the southwest quarter and the west half of the southeast quarter of section 3, the northwest quarter, and the northwest quarter of the southwest quarter of section 10, in township 4 south, range 14 east, W. M.

Defendant denies that the lands withdrawn from settlement and from entry were not valuable for power purposes and denies that the said lands withdrawn from entry were not valuable for power purposes without the use of the lands which lay above said section 35 on the Deschutes river, and for which title had passed from the United States of America, but alleges that the original withdrawals were for the irrigation works, and alleges that said lands so withdrawn were valuable both

for irrigation works and for power purposes, and could be utilized for such purposes by the United States Government.

This defendant denies that on or about the 27th day of July, 1906, a contract was entered into by and between Sherar and Hostetler, as alleged in paragraph VIII of the second amended complaint, but alleges that it is informed and believes that such a contract was entered into on or about the 27th day of January, 1906. Defendant denies that it has any information or knowledge sufficient to form a belief as to whether said option was, for a valuable consideration, on or about the 5th day of August, 1909, sold or assigned to complainant, or that the said right of purchase became vested in complainant, or that thereafter complainant, on or about the 4th day of December, 1909, exercised its right to purchase said lands or paid the consideration therefor agreed upon, and therefore denies the same and leaves the complainant to such proof as may be necessary.

This defendant alleges that it has no knowledge or information sufficient to form a belief as to whether or not at or about the same time, or at all, the complainant, with intent to use said lands for the purpose of developing water power thereon by means of the water flowing through said lands in the channel of the Deschutes river or otherwise, purchased or acquired title to certain other lands lying on said river or through which, or a part of which, the channel of said river flows, or that said complainant purchased the northwest quarter of the northeast quarter of section 3, the northwest quarter of the southeast quarter, the north half of the southwest quar-

ter, or the northeast quarter of the southeast quarter of section 9, or the northeast quarter of the southeast quarter of section 8, in township 4 south, range 14 east, W. M., except in so far as the defendant has hereinabove admitted title in the complainant of various portions of said lands, and under the circumstances as above alleged.

This defendant denies that complainant acquired title to any or all of said lands, or paid the consideration therefor with a design or purpose of using said lands for the purpose of constructing, or maintaining, or operating thereon, a plant to develop electrical power, or in furtherance of said design, complainant employed engineers to make an examination or survey of said lands or of the water power thereon, or to prepare plans or specifications for constructing said alleged plant, which complainant alleged it intended or expected to erect upon said lands for the said purpose or employed said engineers before or after complainant acquired said right to purchase said lands, or before or after the conveyance of said lands was made to complainant by the heirs or devisees of J. H. Sherar, deceased, or that complainant expended large sums of money for said purposes.

Defendant denies that at all or any times from or after the 13th day of June, 1906, defendant had notice of the terms of the instrument whereby said Sherar and wife granted to Hostetler the right to purchase the property in paragraph IX referred to, or of the purposes for which said Hostetler contemplated the purchase thereof; but admits that it entered into negotiations with the heirs

at law of J. H. Sherar, deceased, for the purpose of acquiring right of way over any lands owned by the said Sherar along said Deschutes River, over which its line was located, or any rights acquired in said lands, and also entered into negotiations with one Laughlin, who claimed to own an option to purchase the interest of Sherar in lands along the Deschutes River, and also entered into negotiations with the Interior Development Company, but denies that it entered into negotiations with any of said persons to acquire any lands or rights not owned by said Sherar or his heirs, Laughlin, or the Interior Development Company, and was, at the same time prosecuting proceedings with the United States of America to acquire a right of way over the public lands of the United States along said Deschutes River, in said vicinity, over any and all lands to which title had not passed from the United States, all of which is known to the said Sherar, his heirs, Laughlin, and the Interior Development Company, and all of which negotiations and proceedings were had and made for the purpose of acquiring and securing to this defendant a complete and valid title to a continuous right of way through said lands along the Deschutes River; but denies that said negotiations with said parties were had or entered into before the definite location of its railroad over said lands had been determined upon or adopted.

This defendant admits that at the time of said negotiations the Interior Development Company owned the northeast quarter of the southeast quarter of section 9 above described, and was claiming, and did in fact own,

the northeast quarter of the northeast quarter of section 3, township 4 south, range 14 east.

This defendant denies that it was agreed between the Interior Development Company and the defendant that the defendant should have the right to go upon the lands owned by the Interior Development Company and land claimed by the Interior Development Company, and construct its railroad over the same, and upon the lands claimed and owned by the Interior Development Company, provided that the railway line to be constructed over the said lands by the defendant should be constructed at an elevation above the waters of the Deschutes River that the construction and maintenance of defendant's railway line should not interfere with the construction and maintenance of a dam sixty feet in height above the ordinary low water in said river where the said river runs through the northeast quarter of the northeast quarter of section 3, and above the falls of said river, and denies that defendant agreed to so locate, construct and maintain its said railroad as to permit the construction, maintenance and enjoyment of a dam in the Deschutes River above the falls thereof, sixty feet in height above ordinary low water in said river at said point, but alleges that it was agreed by and between the defendant and the Interior Development Company that said defendant should have the right to go upon said land and construct its line of railroad over and across the said lands owned by the Interior Development Company on the location and at the height at which the same is now constructed and operated, and that in consideration of the construction of said line as now located and constructed, said

defendant could have the right of way over said lands without cost.

Defendant denies that it was agreed by and between said Laughlin and the defendant that the defendant might enter upon the lands described in the contract between Sherar and wife and the said Hostetler, or locate or construct its railway line over the same, provided that the railway line should be so located, constructed and maintained over said lands and over the lands above or below said lands, that a dam sixty feet in height above ordinary low water in the Deschutes River might be constructed in the Deschutes River at any place on the lands in the Hostetler option described, or provided that the defendant should also make full compensation for all lands taken, or for all damages to the lands in the option described, or that no right to build or construct or maintain a railway over said lands should be granted or acquired unless the railroads were located as above provided, or unless or until full damages were paid or compensation made as above provided;

but this defendant alleges that the line of the defendant as originally located and adopted was located at a height above the Deschutes River, sufficient only to protect the line against the high waters of the said river, and that it was stated by the said Laughlin to the defendant that if the defendant should raise its line where the same crosses the site known as the Interior Development Site, in lot 2, of section 3, township 4 south, range 14 east, as high as the same could be conveniently raised without making the expense thereof prohibitive, and without interfering

with the proper and convenient operation of said line, that the damages to the property of said Sherar to which said option of purchase related would be nominal, and that the said Deschutes Railroad Company could secure said lands in case of the exercise of said option, for such nominal consideration; that the agents and officers of the Deschutes Railroad Company advised said Laughlin that the grade of said railroad could be raised to the height at which it is at present constructed and operated, and the said Laughlin represented to and agreed with said defendant, its agents and officers that said height would be sufficient, and authorized and permitted the defendant to enter upon and construct its line of railroad over and across said lands without objection from the said Laughlin; that in the raising of said grade to comply with said understanding and agreement, the said defendant expended in excess of one hundred thousand dollars, to wit, approximately one hundred and forty thousand dollars in the construction of its line at the height at which it is constructed over and above that which it would have been compelled to expend had it constructed its line on its lower grade, only sufficiently above the Deschutes River to allow for the ordinary high waters of said river.

This defendant alleges that the said Laughlin and the Interior Development Company, at all times up to the commencement of this suit by complainant, knew the height at which the said line of defendant was being constructed, and knew of the large sums of money being expended by the said defendant in the construction of its line along said river at said point, and knew that the

defendant was expending a large sum of money over and above what it would have been required to expend for the construction of a line only sufficiently above the Deschutes River at said point to allow for the high waters of said river, in the construction of its line at the elevation at which it was constructed for the purpose of permitting the development of power at said point, and the said Interior Development Company has at all times expressed its satisfaction with the height and manner in which said road was constructed through its said lands, and the said Laughlin, with full knowledge of all said facts, expressed his consent and approval of the height at which said line was proposed to be constructed and was being constructed, and never at any time objected to the defendant to the height or manner in which said road was constructed or to the location thereof, until said line was practically completed across said lands.

Defendant relied upon said representations and the approval of its location and height, and constructed its line and expended large sums of money thereon and large sums in excess of what it would have been compelled to pay had it constructed its line as originally located as hereinabove alleged, and that said complainant and the said Laughlin and the Interior Development Company are estopped from saying that said line is not constructed at a height sufficient to permit of the construction and development of the said alleged proposed power plant at said point, and the development of said river for said purposes.

Defendant alleges that it has no information or knowledge sufficient to form a belief as to the date on

which the said complainant acquired the said Hostetler contract, but denies that said negotiations with the said Laughlin were continued after the acquirement of the said Hostetler contract by the complainant, but all negotiations were had, and the consent of the said Laughlin secured, prior to the said acquirement of the contract by the complainant.

This defendant admits that negotiations with the executors of Sherar were continued up to and including the 25th day of August, 1909.

Defendant admits that it was informed and advised on the 25th day of August, 1909, that the executors of the will of said Sherar deceased, and the attorneys in fact for several of the heirs, were willing that defendant should proceed with the construction of its road across the Sherar lands in the Deschutes canyon, provided that the road could be constructed sufficiently above the river so that it would not interfere with the use of the property for hydraulic purposes, and that the persons who had agreed to purchase the property should consent; that at said times the relocation of the line of the defendant had been completed and the said executors and heirs at law of the said Sherar were advised of the height at which said line was relocated, and it was understood and represented by the said executors of the will of Sherar and the representatives of the heirs, that said height was sufficient so as not to interfere with the use of said property for hydraulic purposes.

This defendant denies that the consent of complainant had not been obtained to the construction of said line, but alleges that in truth and in fact said complain-

ant was advised of the location of said line and expressly consented that said defendant might go upon said land and construct its line thereover, and defendant advised the attorneys for the executors and heirs at law of said Sherar that such consent had been secured.

Defendant admits that about the 25th day of August, the attorneys of the executors of said Sherar advised the defendant that the said executors of the will of said Sherar would consent that the defendant should proceed with the construction of its said road over the lands in the Deschutes canyon, provided the road should be constructed sufficiently above the river that it would not interfere with the use of the property for hydraulic purposes and the person who had agreed to purchase the property should consent; but said complainant at said time was advised of the location and height at which said line was then located, the same being the height at which said line is now constructed and operated, and complainant represented that the said height was sufficient and would not interfere with the development and use of the property for hydraulic purposes.

Defendant denies that the consent of complainant to the location, construction or maintenance of the railroad over the said lands was never obtained, or that no attempt was made to agree with complainant as to compensation which it should receive for the right of way over said line, but alleges that the consent of said complainant was expressly obtained, and it was agreed that in case the said complainant acquired said property the sum of one thousand dollars, which defendant had agreed

to pay to the heirs of J. H. Sherar, deceased, in case said option should not be exercised, should be paid to said complainant.

Defendant denies that at all said times from and after the 5th day of August, 1909, it knew that the complainant had purchased the Hostetler option, but admits that at the time the consent of said complainant was obtained, said defendant was advised that said complainant was contemplating the purchase of said property and the acquirement of the said Hostetler contract.

Defendant denies that it knew that complainant was causing surveys to be made and plans and specifications to be drawn with a view of determining in what manner the hydraulic power could best be installed in the Deschutes River on the lands in said amended bill of complaint described; but admits that it knew that said complainant had employed an engineer, to wit, one Whistler, to examine the height at which the defendant's line was located, so as to determine whether or not said line was of height sufficient as to not interfere with the proposed development of complainant, and this defendant furnished, on and prior to October 20, 1909, to the said Whistler full information as to the height at which it proposed to construct its said line, and no objection to the height thereof was ever made by the said Whistler or by the said complainant at any time until after the line of said defendant was practically completed, and but a few days before the commencement of this suit.

This defendant denies that it knew that the complainant was expending large or any sums of money for

the purpose of making surveys, or plans, or specifications, to be drawn for the purpose of determining in what manner hydraulic power could best be installed in the Deschutes River upon the lands in question.

This defendant denies that at said time defendant knew of the rights of complainant, otherwise than as hereinabove alleged, or knew of the condition of the title of said lands in said amended bill described, otherwise than as hereinabove admitted.

This defendant denies that the lands in the northeast quarter of the northeast quarter of section 3, township 4 south, range 14 east, or in the northeast quarter of the southeast quarter of section 8, township 4 south, range 14 east, lies on both sides of the Deschutes River, but alleges that the entire northeast quarter of the northeast quarter of section 3, lies entirely on the east side of the said Deschutes River, and the land in the northeast quarter of the southeast quarter of section 8 lie entirely on the west side of the river, but that said river runs through the southeast quarter of the southeast quarter of section 8.

This defendant admits that the lands in the southeast quarter of the northwest quarter of section 3, lie on the west side of said river, and that the east half of the southeast quarter of section 3 lies on the east side of said river, but denies that both or either of said lands extend to the channel of said river.

This defendant denies that the lands in said amended bill of complaint described are chiefly valuable by reason

of the fact that they lie on said river, or that through said lands the fall in said river is very great, or that said lands taken together or at all furnish an excellent site for a hydraulic plant or that said facts were well or at all known to defendant at all or any times in said amended bill of complaint mentioned.

This defendant denies that complainant or the Interior Development Company was, at all or any of the times that the acts of defendant complained of were alleged to have been committed, were engaged in surveying or examining said lands, or caused designs or plans to be prepared or work to be done with a view to constructing or installing upon said lands a plant for the generation of power for manufacturing purposes or for sale, and denies that said facts were well or at all known to defendant at the time the alleged acts complained of were alleged to have been committed by defendant, and denies that negotiations had by defendant with the said Laughlin or the executors of the will of Sherar, or the Interior Development Company were had with full or any knowledge on the part of defendant of said facts, or with a view to so locate a line of railway that the construction or maintenance or operation of such railway by the defendant should not interfere with the development of power for said purposes in the said river on the lands in the said amended bill described, or that defendant agreed to so locate, construct, maintain, and operate its railroad as not to interfere with the development of power in the said river on the lands in said amended bill described except as hereinbefore alleged and admitted by defendant.

Defendant admits that it entered upon a portion of the lands in the said amended bill described, and at the time of the commencement of this suit was upon said lands, and was engaged in the construction of a railway over and across said lands, but denies that it entered upon said lands or constructed the said railway over the same notwithstanding or in disregard of any of the rights of complainant or in violation of the or any agreement which it had made with the executors of the will of J. H. Sherar, or with B. F. Laughlin, or with the Interior Development Company, or without authority from complainant, or without right other than as stated in said amended bill of complaint, and denies that the consent of the executors of said J. H. Sherar to the entry upon said lands or the construction of said line of defendant was fraudulently obtained, or that the consent of Laughlin, or the consent of the Interior Development Company was obtained with the agreement on the part of the defendant to so locate its line of railway as not to interfere with the development of power on said lands in said amended bill described, or that said agreements with the said Laughlin or the Interior Development Company were otherwise than as hereinabove described, and denies that the said defendant located or constructed its railway over said lands in violation of the or any agreement made with the executors of the will of said J. H. Sherar, or with the said Laughlin, or with the said Interior Development Company, and denies that such line is constructed by the defendant at an elevation above the Deschutes River which would admit of the construction of a dam in said river, and

particularly where said river flows through the northwest quarter of the northeast quarter of section 3 above the falls of said river not exceeding fifty-five feet above ordinary low water; but alleges that the dam can be constructed in said river in such a manner as to maintain a height of water above the ordinary low water flow of said river of sixty feet without interfering in any way with the line of railroad of the defendant at said point, and without endangering the safety of said line.

This defendant admits that it was engaged in the construction of said railroad over said lands at the time of the commencement of this suit, but that the same was at said time practically completed, and denies that the elevation at which said line was constructed was otherwise than as hereinbefore and hereinafter more particularly set forth.

Defendant denies that it has not made or attempted to make any agreement with complainant as to compensation to be paid for a right of way over said lands, or as to the elevation at which said railroad should be constructed over said lands, and denies that defendant has not, until the bringing in of its answer in this suit, offered to pay to complainant any sum of money as compensation, but alleges that it was agreed by and between complainant and defendant that the defendant should pay to the complainant therefor the sum of one thousand dollars.

Defendant denies that the said Laughlin, or said Interior Development Company, or the executors of the will of said J. H. Sherar were informed by the de-

fendant that the railroad was being constructed in such manner as to permit the erection and maintenance by the owner of the land described in the said amended bill of a dam in the Deschutes River where the same flows through the northwest quarter of the northeast quarter of Section 3, and above the falls of said river, sixty feet in height above ordinary low water of said river, but alleges that said defendant informed the said Laughlin and the said Interior Development Company and the executors of the will of Sherar of the exact elevation at which it intended to construct, and was constructing its line of railroad, and that none of said parties objected thereto or questioned the height thereof or asserted that the same would interfere with the development of said river.

Defendant denies that the executors of said Sherar, the said Laughlin, the Interior Development Company, or the engineers of complainant, believed any representations made by the defendant, except the representation that the line was being constructed at the height at which the same is now constructed and operated, and denies that on account of any representation of defendant that said Sherar, or Laughlin, or the Interior Development Company, or the engineers of complainant, did not protest against the entry upon said lands by defendant, or the construction of said railway, or take any steps to prevent the same; but this defendant alleges that all of said persons at all times knew of the exact height at which said defendant intended to and did in fact construct its said line of railroad.

Defendant denies that complainant was informed or believed that no right had been granted to the defendant to build its railway over said lands, or that no right would be granted to the defendant to build a railway over said lands without the consent of complainant, and this defendant denies that no right had in fact been granted to defendant to build its railway over said lands.

Defendant admits that complainant had not acquired title to said lands until on or about the 30th day of March, 1910, but denies that complainant had no right to inhibit the entry upon said lands by the defendant or the construction of said railway over said lands by the defendant prior to the 30th day of March, 1910, but alleges that at any and all times after the acquirement of said Hostetler option by the said complainant, it could have been secured by action by its predecessors in interest to that end, in case the defendant had been constructing its line in violation of any agreement with the said predecessors in interest of the said complainant, and could have secured such action had the complainant desired so to do, but in truth and in fact the complainant knew at all times of the understanding and agreement and authority under which defendant was prosecuting its work, and at no time until the 30th day of March, 1910, did it protest against the construction of said line as not being in accordance with the understanding and agreement of the defendants with it or its predecessors in interest, and denies that complainant promptly undertook to prevent the further trespass on said land by the defendant, or the construction of said railroad over said lands by the defendant, and denies that the com-

plainant has, at all times since vigorously undertaken to prevent the defendant from acquiring any rights over said lands until such compensation first be ascertained or paid to complainant.

Defendant denies that the construction, maintenance and operation of the railroad over the lands in said bill described by the defendant, if the same be maintained and operated upon the location upon which the same has now been located and constructed and is now being operated, will prevent the building of the dam on the Deschutes river on the lands in said amended bill described, at any point, to a height exceeding 55 feet above ordinary low water in said river, but alleges that a dam can be constructed in said river so as to maintain at all times a height of water sixty feet above the ordinary low water in said river, but denies that the power which complainant will be able to develop by means of the waters of the Deschutes River will be greatly or at all impaired, or that the cost of developing said power will be greatly or at all enhanced, or that the cost of constructing a plant will be greatly or at all enhanced, or that the maintenance or operation of the plant when completed will be greatly or at all obstructed or imperiled.

This defendant denies that it has any knowledge or information as to whether or not about the first day of December, 1909, or about the same time when it exercised its option to purchase the rights of the executors, heirs at law, devisees or assigns of J. H. Sherar, it also or at large expense purchased all or any of the

rights of the Interior Development Company upon the Deschutes river, or particularly the interest of the Interior Development Company in any of the lands lying on said river, or also purchased from others the right to flow lands owned by them upon the Deschutes river, or now owns all or any rights of the Interior Development Company, or particularly all the capital stock of the Interior Development Company, or that it made such purchase with the intent or for the purpose of erecting, maintaining and operating a plant for the generation of power on the lands in the said amended bill described, and therefore denies the same and leaves the complainant to such proof thereof as may be necessary.

Defendant denies that when complainant made its alleged purchase from the Interior Development Company, or from the said Laughlin, complainant was informed or believed, or that in fact the defendant had agreed that its railway should be so located or constructed, or maintained, or operated, as not to interfere with the development of power on the land in said amended bill described, or that the defendant had agreed to construct its road otherwise than as the same is now constructed, located and operated or that the railroad was so located by the defendant that a dam at least sixty feet in height above ordinary low water in the Deschutes river where the same flows through the northwest quarter of the northeast quarter of section 3, or above the falls in said river, could be constructed and maintained without being interfered with by the railroad of defendant, or that said complainant was in-

formed that said railroad was so located by the defendant otherwise than as the same is now located, constructed and operated, or that under complainant's purchase it would have a right to construct or maintain a dam at said point, or of such elevation without interference therewith by the defendant. And defendant denies that complainant was informed or believed, or is informed or does believe, or that in fact all rights of way acquired by the defendant for the construction or maintenance or operation of its railroad along the Deschutes river on lands other than those in the said amended bill described, were acquired by the defendant to the end that a dam sixty feet in height at said point in section 3 in complainant's amended bill referred to might be constructed or maintained without interference with any of the rights acquired by the defendant over the lands other than those in said amended bill described, or that complainant was informed or believed, or that in fact such lands were acquired by defendant otherwise than for the purpose of constructing and maintaining its line at the height at which the same is now constructed, maintained and operated, or that said lands were acquired in pursuance of the agreement had between the Interior Development Company and the defendant, or in pursuance of the agreement had between the said Laughlin and the defendant; or in pursuance of the agreement entered into by the defendant with the executors of the will of said J. H. Shearer; but denies that the agreement so entered into between the defendant and the executors of the will of said J. H. Shearer was fraudulently entered into, and denies that by reason of the

matters in complainant's second amended bill alleged, the defendant is estopped or should not be heard to say that the erection of a dam sixty feet in height above ordinary low water of the Deschutes River at the point in section 3 in said amended bill described would flow the lands of the defendant, or would interfere with the construction or maintenance or operation of the railroad of the defendant on any lands lying above the lands in said amended bill described, or with any of the lands in said amended bill described.

Defendant denies that complainant is informed or believes that in truth and in fact the erection of a dam sixty feet in height above ordinary low water in the Deschutes river at a point in section 3 above the falls in said river, at or near the place described in its said amended bill, would not cause the waters of said river to flow any of the lands of defendant or interfere with the operation and maintenance of the line of defendant on the lands of the defendant in said amended bill described.

Defendant alleges that it believes that a dam sixty feet in height can be so constructed as to maintain the water at an elevation of sixty feet in height above the ordinary low water of Deschutes river, and so as to provide for any high water of the Deschutes river, so that the same will not flow or interfere with the line of the defendant as now constructed; but the defendant alleges that the understanding and agreement had with the said Sherar and the Interior Development Company and the said Laughlin, and the complainant, were had

and made solely with the said persons with reference to the particular lands owned and claimed by the said persons, and without reference to any lands above or interspersed between said lands, title to the right of way over which defendant obtained and was seeking to obtain from other sources, and without any representation as to the height at which said line should be constructed over such other lands or the manner in which the defendant should use such other lands, and the defendant made no representations to the said persons or to the complainant that it should have the right to flow or interfere with said lands or right of way by the raising of the waters of the Deschutes River, nor did said defendant waive any of its rights to prevent the flowing of any such lands or the interference with its use of any of said lands by the construction by complainant of a dam of any height, or the interference with the natural flow of the Deschutes River through any of the lands or right of way acquired by the defendant from sources other than such person.

This defendant admits that at the time of the filing of the bill of complaint, complainant was the owner in fee of the southeast quarter of section 34, township 4 south, range 14 east, W. M.

Defendant alleges that it has no knowledge or information sufficient to form a belief as to whether or not complainant was at the time of the filing of said bill the owner of the west half of the southwest quarter of section 27, or of the northeast quarter of section 34, township 3 south, range 14 east, and therefore denies the

same and leaves complainant to such proof thereof as may be necessary.

This defendant admits that complainant at the time of the filing of its bill of complaint was the owner of the east half of the southwest quarter, the west half of the southeast quarter, and the southwest quarter of the northeast quarter of section 3, the northwest quarter and the northwest quarter of the southwest quarter of section 10.

This defendant alleges that it has no knowledge or information sufficient to form a belief as to whether or not at the time of the filing of the bill of complaint, complainant was the owner in fee of the northwest quarter of the southeast quarter of section 9, the north half of the southwest quarter of section 9, the northeast quarter of the southeast quarter of section 9, the northeast quarter of the southeast quarter of section 8, in township 4 south, range 14 east, W. M., and therefore denies the same, and with reference to the northeast quarter of the southeast quarter of section 9, this defendant alleges that it acquired the right to construct, operate and maintain its line of railroad over and across the same from the Interior Development Company, the then owner of said property, prior to any acquisition thereof by the complainant.

This defendant denies that the complainant, by reason of the facts in its amended bill alleged or otherwise was at said time, or at any time, or has at all times since been in possesion of or entitled to claim of patent for the north half of the southwest quarter of section 35, town-

ship 3 south, range 14 east, W. M., and for the southwest quarter of the northwest quarter of section 3 or for lot 2, the same being the northwest quarter of the northeast quarter, of section 3, in township 4 south, range 14 east, W. M.

Defendant admits that said lands lie in the canyon of the Deschutes River, but denies that the same are valuable chiefly for power which may be generated by dam in said river and by the water flowing from said river upon said lands.

This defendant denies that the fall in the Deschutes River in said vicinity is very great, but admits that there is a fall in said river in said vicinity, but denies that it has any knowledge or information sufficient to form a belief as to whether or not the fall between the lands claimed by complainant in section 34, and the land claimed by complainant in section 8, is approximately ..... or any number of feet, and therefore denies the same.

Defendant admits that at one point in said river in lot 2 of section 3, there is a fall or falls in said river, but defendant denies that it has any knowledge or information sufficient to form a belief as to the proximate height of said falls, and therefore leaves complainant to such proof thereof as may be necessary.

Defendant alleges that it has no knowledge or information sufficient to form a belief as to whether or not said or any of said lands were acquired by complainant for the purpose of developing power upon said

lands, or that the purchase price thereof was paid by complainant, or that complainant paid as the purchase price therefor more than the sum of fifty thousand dollars, and therefore denies the same and leaves the complainant to such proof thereof as may be necessary.

This defendant denies that the said lands were purchased by complainant, or that the purchase price thereof was paid after complainant had been assured by the defendant that its line of railroad across said lands had been so located, or would be so constructed or maintained as not to interfere with the erection of a dam sixty feet in height above ordinary low water in said river where the same flows through said lot 2 in said section 3, or after the complainant had been advised of the understanding as alleged in the said amended complaint between the defendant and said Laughlin, and with reference thereto defendant alleges that complainant purchased said property after the line of defendant was located and constructed in its present location and at its present height, and with full knowledge of the location and height thereof, and without any representation by the defendant other than that the line would be located and constructed at its present height and location, and prior to the purchase of said property this defendant furnished to the complainant full and complete information, data, maps and profile as to height and place at which said defendant intended and proposed to construct its railway.

Defendant denies that complainant relied upon the alleged representations of the defendant as alleged in the said amended bill of complaint, that its railroad had

been so located or would be so constructed or maintained or operated as not to interfere with the erection of a dam as in said amended complaint stated, or also upon the alleged understanding as set forth in said amended complaint between the defendant and said Laughlin, or purchased upon reliance of any such representation or understanding all or any lands lying along said river above the proposed site of said dam, which would be flowed or flooded by the waters of said river should a dam of said height be constructed or maintained in said river where the same flows through said lot 2 in said section 3, or that among other lands so purchased, or purchased at all, by reason of any representation of the defendant, complainant purchased lands in section 9 or 10, township 4 south, range 14 east, W. M., and denies that all or any of said matters, as alleged in said complaint, were well or at all known to the defendant at or prior to the time the defendant located its line of railroad over the lines in the said amended bill of complaint described and claimed by complainant, or over the lands lying above said lands claimed by complainant, and denies that defendant is estopped or should not be heard to say, by reason of the matters in said amended bill alleged, that any of said lands would be interfered with or flowed or flooded, or that the construction or operation or maintenance of its railroad would be interfered with by the construction of a dam in said river where the same flows through lands in said lot 2 in said amended bill described.

Defendant admits that the defendant is claiming and has in fact acquired the right of way over the lands in

the north half of the southwest quarter of section 35, township 3 south, range 14 east, and in lot 2, the same being the northwest quarter of the northeast quarter of section 3, under and in pursuance of the act of Congress of the United States of March 3, 1875, as in said amended bill alleged, and defendant alleges that in addition, and during the prosecution of its application for right of way over said lands from the United States of America, all the parties claiming any interest in said lands or seeking to acquire title thereto, consented and agreed to the erection and construction of said railroad of defendant over the same, in the location and at the elevation at which the same is now constructed, maintained and operated.

Defendant denies that the said north half of the southwest quarter of said section 35 or lot 2 of said section 3, were not at the time the defendant attempted to acquire a right of way over the same, in pursuance of said act of Congress, public lands of the United States, or vacant lands of the United States, or were at said time, or have been since the year 1871, in the possession or occupancy of J. H. Sherar, or his heirs or devisees, or assigns, or that the attempt on the part of the defendant to acquire a right of way over the same as public lands of the United States was or is void, or that thereby the defendant acquired no right of way or interest in the said lands or any thereof.

Defendant admits that it claims and has in fact acquired a strip of land one hundred feet in width, being fifty feet on each side of the center line of the location

of its railroad over and across the southeast quarter of the southwest quarter (erroneously described in defendant's amended answer and in complainant's second amended bill as the southeast quarter of the northwest quarter) of section 9, the west half of the southwest quarter of section 16, the west half of the northwest quarter of section 21, the northeast quarter of the northeast quarter of section 20, the northeast quarter of the southeast quarter of section 20, and the southwest quarter of the northeast quarter of section 32, all in township 4 south, range 14 east, W. M., and that it has also acquired under and in pursuance of the act of Congress of the United States of March 3, 1875, a right of way 100 feet in width on each side of the center line of location of its railroad over other public lands of the United States which lie along the Deschutes River, and particularly over the south half of the southeast quarter, and the southwest quarter of the southwest quarter of section 9, the east half of the northeast quarter, and the northeast quarter of the southeast quarter of section 17, the southeast quarter of the northeast quarter (erroneously described in plaintiff's second amended bill as the northeast quarter of the northeast quarter) and the west half of the southeast quarter of section 20, the west half of the northeast quarter and the west half of the southeast quarter of section 29, the northwest quarter of the northeast quarter and the southeast quarter of the northeast quarter, of section 32, the southwest quarter of the northwest quarter, and the west half of the southwest quarter of section 33, all in township 4 south, range 14 east, W. M., and that said lands are necessary to it for

its railroad; that its railroad has been located over the same, and that the erection of a dam in said river at the point where said river flows through said lot 2, will flow the waters of said river back on said lands acquired by defendant for railroad purposes and back upon the right of way over the public lands above described from which the defendant has acquired a right of way.

Defendant admits that the said river does not flow through or upon the southeast quarter of the northwest quarter of said section 9, but alleges that said description was erroneously made, and should have read as above alleged, the southeast quarter of the southwest quarter of said section 9, and alleges that said river does flow through the southeast quarter of the southwest quarter of said section 9.

Defendant denies that said river does not flow upon the south half of the southeast quarter or the southwest quarter of the southwest quarter of said section 9; admits that said river touches on one side the northwest quarter of the southeast quarter of section 9, the northeast quarter of the southeast quarter of section 9, and the north half of the southwest quarter of section 9, but denies that said river flows through or touches the northeast quarter of the southeast quarter of section 8, township 4 south, range 14 east, and denies that the erection of a dam sixty feet in height above ordinary low water mark in the Deschutes River, where the same flows through said lot 2 in said section 3 in the amended bill of complaint described, would not cause the waters of said river to flow over or upon any of the lands claimed

by defendant in section 9, 17, 16, 21, 20, 32, or 29, or affect the flow of the waters of said river upon said lands or any thereof, but alleges the fact to be that the erection of such a dam in said lot 2 would cause the waters to flow upon the lands and right of way owned by the defendant in said sections 9, 17, 16, 21, 20, 32 and 29.

This defendant denies that such flooding would not affect the railroad lines of the defendant as located upon said lands, or any thereof, or that *that* this is well or at all known to the defendant, or was known to the defendant at the time it located its railroad line over the same.

This defendant denies that its railroad line was located over said lands with the intent to place the same at such elevation above said river that the erection of a dam of said height at the point aforesaid would not affect, or impair, or interfere with the railroad line of the defendant where the same is located over or upon said lands, or any thereof, but alleges that said line was located at such elevation that if the water at the proposed dam site in said lot 2 did not flow over the tracks of defendant, the same would not flow over the tracks at any point above said dam site, but denies that said location over said land was so made by the defendant with the end in view, as alleged in complainant's second amended bill, or in pursuance of the alleged agreement entered into between the defendant and the Interior Development Company and B. F. Laughlin, as alleged in said amended bill, or in consideration that said defend-

ant should be allowed to locate its railroad over the lands then claimed by the said Interior Development Company or over the lands then claimed by the said B. F. Laughlin, under the option to purchase, as in said amended bill alleged, at such an elevation above the waters of said river that a dam of the height in said amended bill mentioned might be constructed or maintained in said river where same flows through said lot 2 in the said amended bill described, and denies that the defendant is estopped, or should not be heard to say, that the erection of a dam of said height at said place would interfere with its railroad where the same is located over said lands or any thereof.

Defendant admits that it entered upon the lands belonging to complainant and claimed by complainant in the said bill of complaint set forth, and at the time of the commencement of said suit was engaged in the construction of a railroad over and across said lands, and alleges that it had practically completed the construction of its railroad over and across the same prior to the commencement of this suit, but denies that the said acts of the defendant were in violation of any rights of complainant or its ownership or interest in the lands in said amended bill of complaint described, or was against the protest of complainant, and with reference to the height at which said line of defendant is constructed, this defendant says that it is informed and believes and therefore alleges that a dam sixty feet in height above the ordinary low water in said river, where the same flows through lot 2, in section 3, township 4 south, range 14 east, can be constructed in such a manner as not to flood

the track or right of way, or damage the railroad of defendant, and so as to maintain a head of water sixty feet above the low water mark of said river, and to take care of the flood waters of said river, without damage to the line of railroad or tracks of defendant, but that in case said dam is not properly constructed, or is negligently constructed, or constructed without regard to the rights of this defendant, that a dam of the height of sixty feet will overflow the tracks and right of way and property of this defendant and interfere with the operation of its said line of railroad, but denies that said railroad is so constructed that any dam erected in said river where the same flows through lot 2, exceeding 55 feet in height could not be constructed without flooding the said line of railroad through the said lands claimed by complainant.

Defendant denies that prior to the time the complainant acquired title to said lands, or prior to the time that the defendant commenced the construction of said railroad, the defendant was warned by the then owners of said land, or by complainant, to desist from its work, or was advised of any such claim on the part of defendant until the commencement of this suit, and was not advised that complainant or its predecessors in interest were making any claim that it could not build a dam in excess of fifty-five feet in height at said point until long after the commencement of this suit, and until a short time prior to the filing of the amended bill of complaint on or about June 4, 1910.

Defendant admits that the defendant was advised on the 25th day of August, 1909, that the defendant would

be permitted to proceed with the construction of its railroad across that portion of the lands in said bill of complaint described, owned by the said Sherar, provided the said railroad should be constructed sufficiently above the water in said Deschutes River so that it would not interfere with the use of the property for hydraulic purposes, but alleges with reference thereto that at the time the said advice referred to in the said complainant's amended bill was given, the heirs at law of the said J. H. Sherar and the executors of the will of said J. H. Sherar and their attorneys were advised of the height at which said defendant proposed to construct its line through said property, and of the height at which said railroad company did in fact construct its railroad, and represented that said height was sufficient, and would not interfere with the development or use of the property for hydraulic purposes, and made no protest or objection thereto until long subsequent to the commencement of the said construction, and until the defendant had expended large sums of money on the faith of such representations and until the construction of the line of said company had proceeded to the extent that said line could not be changed without very large expense, and without greater expense than that for which the whole property owned by the said Sherar or the complainant herein in the said neighborhood could be purchased.

Defendant denies that complainant has not, or the executors or heirs or devisees of J. H. Sherar have not, or the said B. F. Laughlin, or the Interior Development Company have not, nor has any of said parties consented to or given permission that the defendant should

locate or build a railroad over said lands or any thereof, as such railroad is located and constructed over the same, but this defendant alleges that all of said persons consented and agreed to the construction of said railroad as the same is now constructed over said lands.

Defendant denies that the railroad was located or constructed over the said lands or is now maintained or operated over said lands without the consent or permission of the owners of said lands or any thereof, or notwithstanding the objections or protests of the owners of said lands, or particularly or at all of the complainant. This defendant denies that complainant did not discover the true elevation at which said railroad was being constructed until after the 30th day of March, 1910, or until after the deeds conveying said property to the complainant had been executed or at all to complainant but alleges that complainant had full knowledge of the elevation of said railroad at all times during the progress of said work, and long prior to the 30th day of March, 1910, and particularly full information, data, maps and profiles were furnished to complainant more than five months prior to the 30th day of March, 1910, but that no objection or protest was ever made by complainant or any of its servants or employees to the defendant prior to the 30th day of March, 1910.

This defendant denies that complainant was deceived, or that the executors or devisees or heirs at law of J. H. Sherar, or that the said B. F. Laughlin, or the said Interior Development Company, or either of them was deceived by the representations of defendant, or were led

to believe or did believe that the railroad which the defendant contemplated constructing, maintaining or operating over said lands would be located, constructed or maintained or operated at such an elevation above the waters of the Deschutes River that a dam sixty feet in height above ordinary low water where said river flows through the lands in lot 2 in said amended bill described, could be built or maintained without interfering with the construction, maintenance and operation of said railroad, or that any representation was made to any of said persons except that said line would be located and constructed, and was in fact being located and constructed at the height and location at which the same is now constructed, maintained and operated; and denies that by reason of such or any deception or the representations of the defendant by which such or any deception was accomplished, the executors or heirs at law, or devisees of said J. H. Sherer, or the said Laughlin, or the said Interior Development Company, or the said complainant, did not take any steps to prevent the location of said railroad by the defendant, or the construction of the same as located, and defendant alleges that no such steps were taken because the line of said railroad company was being located and constructed, and is now located, constructed, maintained and operated in full accord with the understanding and agreement of the said executors, heirs at law and devisees of said Sherar, said Laughlin, the said Interior Development Company, and complainant, and defendant, and with representations made by the said defendant during the progress of all negotiations with said individuals, and during the construction of said line.

Denies that at the time the defendant located its railroad or at all, or any time since said time, the defendant had known or now knows that the lands in said amended bill described, or other than as alleged to be owned or claimed by complainant, are valuable chiefly because of the fact that the said Deschutes River flows through the same, or in its course through said lands the flow of said river is so great that the waters of said river can be advantageously used in the development of power, but this defendant alleges that said lands are of a rocky, low grade, character of lands, of little value for any purpose, and while it may be true that their capacity for development of water power is greater than that for any other purpose, the said lands are not of a high value for the development of water or electrical power, and cannot be developed therefor without large expense, and large proportionate expense in comparison with the expense at which the electrical power can be developed at other points in the neighborhood of the said power site, the market for which said electrical power would be the same as the market in which electrical power from this site would have to be disposed of. Defendant admits that prior to the organization of defendant said Sherar had agreed to sell said lands, but denies that said agreement of sale was made for the purpose, or was acquired by the parties with whom said agreement was made, for the purpose of developing power on said lands, or that the said persons who acquired said option had any intention whatever of developing power on said lands, but admits that said Sherar had entered into a written contract on or about the 27th day of January, 1906, to sell said lands, but denies that the said right to purchase the

said property had been acquired for said purposes by said Laughlin, or that the said Laughlin had any intention whatever of developing power on said property, or that said property was acquired by complainant for said purpose.

Defendant denies that it was advised or knew that the Interior Development Company had attempted to appropriate the waters of the Deschutes River where the sam flows through lot 2 in said amended complaint described, for the purpose of erecting in said river at said place a dam sixty feet in height above the low water of said river, for the purpose of developing power thereby, but admits that the defendant was advised and knew that the Interior Development Company had on a number of occasions, posted notices in said lot 2, advising that it intended to appropriate the waters for the purpose of constructing a dam; that said notices were posted at various times from January, 1906, up to the time of the commencement of this suit, and that the height of dams specified in said various notices varied in height from no feet up to sixty feet in height, but defendant had no knowledge other than as stated in said various notices, of any intention on the part of any one to construct a dam at said point, and with reference thereto, it has been the custom and habit, for a numebr of years, of individuals posting notices at numerous points and almost continuous points along the Deschutes River from the lower end of the gorge of said Deschutes River, up to the head of the gorge, and without any real intention on the parts of any of said persons posting said notices, to develop or construct any power plant along said river.

Defendant admits that it entered upon said lands, and at the time this suit was commenced, was engaged in constructing its line over said lands, and that its line was practically completed before the commencement of this suit, but denies that defendant constructed its line contrary to the representations of defendant or otherwise than with the full accord with all representations made by defendant, and denies that the erection, construction and maintenance of the railroad of defendant over said lands has greatly or at all hindered or delayed complainant in the prosecution of the work of constructing or installing of a power plant on the river on said lands, or will greatly hinder or delay complainant in the prosecution of said work, or after said work of construction or installing of said plant has been completed that the said power plant will be greatly or at all interfered with or impaired by slides caused by the building of said railroad, or by the maintenance or operation of said railroad, or that the power to be developed upon said lands, or which complainant alleges it contemplates or has been engaged in developing upon said lands will be greatly or at all curtailed or impaired, or that complainant will be thereby irremediably, irreparably, or at all injured or damaged, or that the construction or maintenance or operation of said railroad over said lands will enhance the expense of construction of the power plant on said land by complainant in a sum exceeding ..... dollars, or in any sum at all; but on the contrary will greatly facilitate the construction of any plant which the complainant may construct, and will greatly lessen the expense thereof.

Defendant denies that the amount of power which can be developed upon said ground by the construction of a dam in said river where the same flows through lot 2, in section 3, in the amended bill described, will be impaired to the extent of .....or any per cent of the total power which could be developed by such dam, should such dam be erected sixty feet in height above ordinary low water in said river, or that the cost of the power developed by the plant to be erected on said river on said land by complainant will be enhanced to the extent of $....., or any sum whatever per horse power, and denies that by reason of the premises the damages sustained by complainant by reason of the location of the railroad of the defendant over said lands as the same has been located and constructed or as now maintained or operated, will be in excess of $..... or any sum whatever, or that the amount involved in this controversy is more than $2000, exclusive of interest or costs.

This defendant denies that it has any knowledge or information sufficient to form a belief as to whether or not at all or any time since it acquired the right to purchase the said lands, complainant maintained agents in the state of Oregon who were authorized to agree with the defendant as to the terms or conditions upon which the defendant should enter upon said lands, locate its railroad over the same, or construct or complete its railroad thereover, or acquire a right of way over said lands, or as to the compensation which should be paid therefor, except that this defendant alleges that at various times officers and agents of the said complainant represented

to defendant that they had authority to treat with reference to such matters, and the defendant at such times treated with such officers and agents of said complainant, and secured consent of such officers and agents to go upon said lands and construct its said line of railroad over the said lands, and particularly the defendant treated with one Walter S. Martin, the president of the Eastern Oregon Land Company, and with one Whistler, who was employed by said Eastern Oregon Land Company as a consulting engineer.

This defendant denies that complainant has no plain, or adequate, or speedy remedy at law, or is unable by reason of the matters in said amended bill alleged, to prevent, without assistance of a court of equity, the injuries or damages complained of, or to protect its property from the alleged unlawful acts of the defendant, or to obtain compensation for its property taken or the invasion of its rights, but must seek relief in equity.

This defendant admits that since the commencement of this suit, patents have been issued upon the application to select lands in section 35, and also the northwest quarter of the northeast quarter of section 3, but alleges that such patents were issued and the title conveyed by the United States of America was made subject to the right of way of the defendant over and across said lands, as shown by its map of location approved June 20, 1910, and hereinafter more particularly referred to, but denies that the legal title to said lands became vested in complainant, or that complainant is the owner in fee simple of said lands, except that the same are subject to the right of way of this defendant over and across the same.

Defendant admits that since the filing of the original bill of complaint, the Deschutes Railroad Company has completed its railroad over the lands, and is now maintaining and operating its railroad over the same, but denies that the same was completed, or that the same is now maintained or operated, in total or any disregard of the rights of complainant, and admits that it has caused a fence to be built over the lands in question and along its line of railroad as the same is located, constructed and maintained over the said lands, but alleges that said fence was constructed pursuant to and in conformity with the laws of the state of Oregon requiring railroads to fence their rights of way, but denies that the fence is so located, constructed or maintained over said lands, in such manner or at all that a large or any part of said lands are wholly separated by the fence so constructed from access to the Deschutes River.

This defendant admits that unless enjoined by this court it will continue to maintain the said fences as required by the laws of the state of Oregon, and to maintain and operate its said railroad over the land in said amended complaint described and claimed by complainant.

And this defendant now shows to the court that the defendant is a corporation duly organized and existing under and by virtue of the laws of the state of Oregon, having its principal office and place of business in the city of Portland therein; that it has power under its articles of incorporation to acquire or construct, equip and operate a line of railroad and telegraph from a point

of connection with the constructed line of railroad of The Oregon Railroad and Navigation Company, at or near Deschutes Station, in the State of Oregon, and thence by some eligible route to be selected by the board of directors of the company by the way of the valley of the Deschutes River to a point at or near Bend, in the county of Crook, in said state; that the defendant is organized as a common carrier of freight and passengers, and has power to condemn land for its railway purposes and for rights of way for its railroad, including station grounds therefor, over and along the route for its railroad above referred to, and is a public service corporation; pursuant to said corporate power the defendant caused a survey of its line of railroad to be made between the termini above named; that same was staken out upon the ground, and at a meeting of the board of directors of the defendant company, duly called and held at the office of the company in Portland, Oregon, on November 5, 1908,—this defendant having been organized long prior thereto—the governing board of the defendant adopted said survey as the line of definite location of this defendant's railroad, and as so adopted the said line of railroad passes over the following described land described in the complainant's amended bill, including also other lands lying to the north and south of the same, and including in part public lands of the United States, said lands referred to in the complainant's amended bill, over which the defendant's railroad was so surveyed and located and its line of route adopted, being described as follows:

The north half of section 35, and the southeast quar-

ter of section 35, both in township 3 south, range 14 east, W. M., Lots 1 and 2, the southwest quarter of the northeast quarter, and the east half of the southwest quarter, of section 3, the northwest quarter of the northwest quarter of the southwest quarter of section 10, and the northeast quarter of the southeast quarter, the south half of the southeast quarter, and the south half of the southwest quarter of section 9, all in township 4 south, range 14 east, W. M.

The title to the north half of the southwest quarter of section 35, township 3 south, range 14 east of the W. M., and lot 2, section 3, township 4 south, range 14 east, W. M., was at the time and up until the 26th day of February, 1913, in the United States of America, subject, however, to a right of way thereover, as hereinafter in this answer alleged; that said right of way thereover is in the defendant and any claim in and to said north half of the southwest quarter of said section 35, or the said lot 2 of section 3, in the complainant, was acquired, if any, as assignee of the Santa Fe Pacific Railroad Company, patents to which Santa Fe Pacific Railroad Company were made subject to said right of way of the defendant; that said lands were at all times subsequent to April, 1906, withdrawn by the United States Government and not subject to entry settlement, sale or disposal until after the approval of the right of way of the defendant company thereover; that any title thereto or right therein claimed by complainant, if any, was acquired under and by virtue of lieu land selection by the Santa Fe Pacific Railroad Company, and pursuant to the act of Congress approved June 4, 1897, entitled

"An Act making appropriation for sundry civil expenses of the government for the fiscal year ending June 30, 1898," and the application to select said lands was not approved or patent issued until the 26th day of February, 1913, and long subsequent to the approval of the right of way map of the defendant over and across said lands, and to the granting of the right of way to the said defendant, and such approval of the selection and of the issuance of the patent to said Santa Fe Pacific Railroad Company was made subject to the right of way of the defendant theretofore granted by the United States of America.

Prior to entering upon the lands hereinbefore specifically described, and over which, as hereinbefore alleged, the survey of the line of this defendant's railroad runs, this defendant secured a license and permit to go upon the said lands from the heirs and devisees of the said Sherar deceased, the executors of the will of the said Sherar deceased, and also from certain holders of a certain option to purchase the same which said Sherar had during his life time executed, and from the complainant who, subsequent to the said option, purchased the said property from the said Sherar Estate and all of the said persons and corporations interested in the said lands, and this defendant now charges that whatever right or title the complainant has, if any, to the same was secured from the heirs of the said Sherar deceased, or from the Interior Development Company. In consideration of the benefits to attach to adjoining lands owned or claimed by them said persons consented and agreed that the defendant should have the right to immediately

enter upon said lands owner or claimed by them, and over which the survey of the defendant's railroad runs, and to construct its railroad thereover, and it was agreed that in case the option given by the said Sherar on the said lands owned and claimed by the said Sherar should not be exercised, then that the heirs and devisees of the said Sherar should make, execute and deliver a deed to the defendant for a right of way thereover for this defendant's railroad and that this defendant should pay for the same the sum of $1000.00, as was it understood and agreed likewise with the complainant, who was then negotiating for and considering the propriety of the purchase of the said lands from the Sherar Estate, that if the complainant should purchase the same the moneys to be paid by this defendant should be paid to the said complainant upon the execution of the deed for right of way thereover. That it was agreed by and between the defendant and the Interior Development Company that the defendant might go upon and construct its line across the lands owned by the Interior Development Company and lands claimed by said Interior Development Company, including lot 2 of said section 3, and other lands, and in consideration of the benefits to accrue to the other lands, owned by the said Interior Development Company and claimed by said Interior Development Company, that the said Deschutes Railroad Company should have a right of way along said land free of charge. Prior to the arrangements aforesaid this defendant had located its line of railroad over the said lands and was contemplating the construction thereof through the said lands along the bank of the Deschutes River at practically high water mark thereof, but suffi-

ciently above high water mark to prevent all probability of flooding of its tracks in periods of high water of the Deschutes River; and in connection with defendant's negotiations aforesaid, this defendant was induced to and did consent, and on its part agreed that it would relocate its line at a higher elevation than formerly contemplated as to that part of its line running over lot 2 aforesaid, and that the same should be located and constructed at an elevation of about 60 feet above low water mark of the Deschutes River through said lot 2, for that, it was then contemplated on the part of the said various claimants of the said lot 2, or some of them, including the complainant, that if a right to the said lot 2 could be acquired a dam would or might be constructed across the Deschutes River for some business purposes of said claimants, or some of them, including the complainant if the complainant should purchase the interest of the Sherar Estate therein, and in the said other lands, and extinguish the option standing thereon; and thereupon this defendant did relocate its said line where the same passes over the said lot 2 at an elevation of approximately 63.5 feet above low water mark of the Deschutes River, adopted its said relocated line, and in consequence thereof was obliged to, and did, relocate other parts of its line above and below the said lot 2 to conform the grade thereof to the established grade over the said lot 2—all at very large expense, as hereinafter set forth, and all done in pursuance of the consent and thereto and agreement therefor by this defendant made as a part of the negotiations aforesaid to enter upon all of the said lands in the complainant's bill referred to, and over which, as in this answer set forth,

this defendant has located its road, and this defendant immediately furnished to the complainant and its representatives a map of the said relocated line, showing the relocation thereof, as herein set forth, with which the complainant, and its representatives, expressed its satisfaction; and thereupon, and about the month of September, 1909, and in the early part thereof, this defendant began the prosecution of its work of constructing its railroad grade over and along its said relocated line, and has ever since diligently and constantly prosecuted the work thereon; that the defendant's railroad has been entirely completed and has been operated since about the 27th day of November, 1910, and that the grade of said line was practically completed at or about the time of the filing of the complainant's original bill herein. And in so entering upon the said lands and relocating its said line of railroad over said lot 2 and over other lands above and below the same, over which the defendant's road was relocated, and which as aforesaid is located and constructed at an elevation in excess of 60 feet above low water mark of the Deschutes River, and in reliance upon the consent and understanding, as aforesaid, this defendant expended large sums of money in the construction of its roadbed through the said lands, including said lot 2 and lands above and below the same, and has expended in connection with the construction thereof in excess of the sum of $30,000.00 per mile in raising the grade of the defendant's roadbed; and in relocating the grade thereof over the said lot 2 and over adjoining lands above and below the same to make uniform the said grade and conform the same to the grade over said lot 2 the defendant has expended a sum exceed-

ing one hundred thousand dollars over and above what the defendant would have been obliged to expend on the construction of its line on the water level grade through the said property. And at all times when the said road-bed was being constructed through the said lands, complainant, well knowing that the same was being constructed, and well knowing the grade or elevation thereof over said lot 2 and adjoining lands, including the other lands in the complainant's bill described and over which in this answer it is alleged defendant's road was constructed, made no objection whatsoever to the defendant's construction work or to the final location of the defendant's road over the said lands, but acquiesced in the said location of the line and in the construction work by the defendant done in the construction of its road-bed over and along the said relocated line, until after the construction of the same had been practically completed, said the complainant having in the meantime acquired, pursuant to its negotiations, whatever interest it had or could acquire to any of the said lands in the complainant's amended bill mentioned.

And this defendant now avers that its entry upon the said lands in the complainant's amended bill described, ownership whereof in the complainant is by the complainant's said amended bill charged and over which, as in this answer set forth, this defendant located and constructed its said line, and the construction by this defendant of its road-bed and grade thereover for its railroad, were made under license and permit, as aforesaid, and rightfully, and that this defendant relied upon

such license and permit and authority in such location and construction of its road-bed and road, and spent large sums of money in reliance thereon, and at all times since the first day of September, 1909, complainant has had full notice and knowledge of the construction by the defendant of its said line over the said lands, and of the manner in which, and the elevation at which the same was being constructed, and the entry of this defendant upon the said lands and the construction of its line thereover were made prior to the acquisition of any title thereto by the complainant, or to any part thereof, and so much of the lands in the complainant's amended bill descibed and title to which is claimed by the complainant, if any title thereto has been acquired was purchased and acquired with full knowledge of all of the foregoing facts, and of the construction by this defendant of its line of railroad over the same, and the complainant has never at any time until after the completion of the construction of the defendant's road-bed objected to this defendant's title on account of the construction of its line of railroad, or the manner in which, or the elevation at which its said line of railroad was being constructed.

And this defendant now alleges that the elevation at which this defendant's road is constructed over said lot 2 is such that a dam can be constructed in such manner as to maintain the height of water of at least 60 feet above the ordinary low water mark of the Deschutes River, and can be constructed and maintained by complainant, as this defendant is informed and believes, so that said height of water can be maintained at all times

without injury or damage to the lands of this defendant as constructed, maintained and operated.

The defendant, further answering the complainant's second amended bill, now further shows that the line of railroad of this defendant, constructed, is for the benefit of the public and for public use, and where the same crosses the lands hereinbefore referred to, over which the same crosses the lands hereinbefore referred to, over which the same has been constructed, it is a part of an entire line of railroad from the point of connection with the line of The Oregon Railroad and Navigation Company at Deschutes Station to Bend, in the county of Crook, Oregon. The grade of the defendant's line of railroad, where the same runs over the lands hereinbefore referred to, and some or all of which are claimed by the complainant, is made to conform to and connect with the grade of the remainder of the defendant's line of road above and below the said lands; that the work of construction of the said line through the said lands has been prosecuted constantly and diligently at all times since the first day of September, 1909, and that at all times while the work of construction has been prosecuted all persons, including the complainant, have had full notice of the prosecution of the said work and the manner in which the road-bed of the defendant's road was being constructed and the elevation at which the same was being constructed, and the entry by the defendant upon the lands over which the defendant's road is located and constructed and the work done thereon in connection with the said construction work were with the consent of all persons having or claiming any

interest in any of the lands in complainant's amended bill described and over which defendant's line of road runs, as in this answer set forth; and all persons along the line of road of the defendant, including the complainant's predecessors in interest in any of the lands now claimed by the complainant, have acquiesced in the work of construction and in the expenditure by the defendant of large sums of money in such construction—all of which acquiescence has continued at all times until after the completion of the road-bed of this defendant's railroad through the said lands. And while it may be true, as hereinbefore in this answer alleged, that complainant has acquired title to certain parts of the lands in the complainant's bill described, its right or title thereto was finally acquired after the defendant's road-bed over and across the said land was completed, and at the time of such acquisition complainant well knew that the same had been practically completed, and while it may be true that the complainant claims some right or interest in and to lot 2 section 3, township 4 south, range 14 east, W. M., and in and to the north half of the southwest quarter of section 35, township 3 south. range 14 east, W. M., yet, in truth and in fact, any right or interest in and to said lands was acquired subsequent to the approval of the right of way map of the defendant over and across the same, and any interest therein was acquired under and by virtue of the lieu selection of the Santa Fe Pacific Railroad Company, the approval of which said lieu selection and the issuance of patent therefor, was subsequent to the approval of the right of way map of defendant over said lands, and said approval and the issuance of patent therefor was made subject to the

right of way of defendant over said lands, and that during all of said times subsequent to April 25th, 1906, and October 24, 1908, and until after the approval of the said right of way thereover, said lands were withdrawn from sale, entry, settlement or disposal by the United States of America, and no title was acquired thereto by any person until after the approval and acquirement of the right of way of the defendant and title to said lands was granted by the United States of America subject to said right of way of the defendant, and this defendant now says that the complainant, by reason of its actions and doings hereinbefore specifically alleged, and its silences and inactions, as hereinbefore alleged, has waived its right to be heard to say, and ought not to be heard to say, that this defendant's claim to continue the occupation of its railroad and the operation of its railroad over said lands, ought to be enjoined, or that complainant has been damaged or will be damaged by the continuance of such occupation in any sum in excess of $1000.

And this defendant now shows that it is a solvent corporation and has expended approximately six million dollars in the construction of its line of railroad, and has property far in excess of any damages which might or could be recovered against it by the complainant for the occupation for its railway purposes of any lands in which the complainant is interested, and that it is able to pay any judgment that may be recovered by the complainant that this defendant is able, ready and willing to pay to complainant the sum of $1000.00 for the lands occupied by this defendant for its right of way,

and now hereby offers to pay the same to the complainant upon the execution and delivery to the defendant of a good and sufficient deed for the defendant's right of way through the said lands; but this defendant says that the defendant's line of railroad has long since been completed, much of such construction work having been done and completed, and large sums of money expended thereon, since the preliminary hearing heretofore had in this cause upon the application of the complainant for a temporary injunction herein and since the order of the court heretofore passed in this cause denying such temporary injunction, and any injury, if any, to the complainant can be adequately compensated in damages, if the complainant is entitled to any damages other than the sum of $1000.00, and if upon final hearing of this cause and final injunction shall issue, as prayed for in the complainant's said amended bill, it will greatly impede and interfere with the maintenance and operation of defendant's railroad, and will result in great and irreparable injury to the defendant and to the public.

And this defendant now also further shows to the court in respect to the said lot 2, section 3, upon which in part complainant by its amended bill claims the right to locate its pretended dam site for power purposes, and in repect to the north half of the southwest quarter of section 35, township 3 south, range 14 east, that:

Heretofore, and in the month of February, 1906, this defendant having been at that time fully and completely organized as a corporation, with corporate power and authority, as hereinbefore alleged, filed with the Secretary of the Interior of the United States a copy

of its articles of incorporation, duly certified to by the Secretary of State of the State of Oregon and by the County Clerk of Multnomah County, Oregon, in which county its principal office and place of business was located, as true and correct copies of the original articles of incorporation originally filed with the Secretary of State and County Clerk of said Multnomah County, and also filed with the Secretary of the Interior with said copy of articles of incorporation due proofs of its organization, the same being filed with the said Secretary of the Interior in compliance with and under and pursuant to an act of Congress of the United States, of March 3, 1875, entitled, "An Act granting to railroads the right of way through the public lands of the United States," and under and pursuant to the rules and regulations of the Interior Department of the United States, which had been promulgated by the said secretary under said act and to carry out the purposes thereof, said papers being so filed by this defendant for the purpose of securing to this defendant rights of way over the public lands of the United States along and over the route of this defendant's proposed railroad provided by its articles to be constructed, for that much of the lands over which the defendant's road must be constructed to carry out its charter power were public lands of the United States, among which were said lands last above described in section 35 and in section 3, and the lands hereinafter in a further part of this answer described; and the copies of articles of incorporation and due proofs of organization were accepted and received by the said Interior Department of the United States and by the Secretary of the Interior approved of.

That thereupon and thereafter defendant caused a survey of its line of road to be located, and to be so located in large part along the course of the Deschutes River, and as and for such location a survey of the defendant's road was made by the defendant's authority, and was staked out and located upon the ground, and its line of location as surveyed and located was by the governing board of this defendant duly adopted, and as so located and adopted the defendant's line of railroad passes over and across the north half of the southwest quarter of section 35, and over and across lot 2, otherwise described as the northwest quarter of the northeast quarter of section 3, township 4 south, range 14 east, all which were then public lands of the United States, and which are in part lands by the complainant claimed; and also over and across certain other public lands of the United States situate in township 4 south, range 14 east, and which are hereinafter more particularly described, and the flooding of which, as in this answer hereinbefore set forth, would be occasioned by any dam by the complainant constructed under the claim by complainant made of right of construction of such dam; and this defendant's line of railroad having been so located as aforesaid over the said lands, this defendant on the 7th day of November, 1908, caused a profile map of such survey and location of its said road to be filed with the Register of the Land Office of the United States at The Dalles, Oregon, that being the public United States Land District in which the said lands were situate, and in and by the said maps so filed this defendant's located line of railroad over the said lands was delineated and shown, and such reference made thereon, together

with field notes of such survey which were attached to said map, as that said line of location could be definitely traced out upon the ground and the location thereof in respect to the public survey of lands over which the same runs could be determined; said maps were filed in duplicate and were duly forwarded to the Secretary of the Interior of the United States for his consideration and approval or disapproval, as by the said act of Congress provided, and as by the rules and regulations of the said Secretary thereunder provided, and thereafter, and on the 20th day of June, 1910, since the commencement of this suit and the filing of the complainant's original bill herein, the said Secretary of the Interior duly approved the said location and survey of the said profile maps thereof; and while it is true that in April, 1906, and October, 1908, said the north half of the southwest quarter of section 35, township 3 south, range 14 east, and lot 2, otherwise described as the northwest quarter of the northeast quarter of section 3, township 4 south, range 14 east, had been withdrawn by the Land Department of the United States from sale and disposition by the land officers of the United States, the approval by the said Secretary of the Interior of this defendant's said maps and of the survey and location by this defendant of its said railroad over the said lands, and which the said Secretary of the Interior was authorized by law to make, has confirmed and secured to this defendant a right of way over the said last above described lands, and over the other lands in this answer referred to, and hereinafter described and referred to hereinafter as lands over which rights of way have been acquired by this defendant, which right of way over said

lands consists of a right of way 100 feet on each side of the center line of location of this defendant over the said lands; and this defendant now charges the fact to be that it has secured and is now the owner of, such right of way over and across all the said lands covered by its said map, including the said lands in section 35, township 3 south, range 14 east, and said lot 2 in section 3, township 4 south, range 14 east. And this defendant now avers that its said line of railroad over and across said lands is located and constructed within the limits of the said 100-foot right of way on each side of the center line of location made as aforesaid and shown and delineated upon the said profile maps; and to the extent of the said right of way the previous withdrawal by the Land Department of the United States of the said lands from sale and disposition by the United States was cancelled, so that, as this defendant now avers, the right of way of defendant is prior to any right in any person whomsoever in the north half of the southwest quarter of said section 35, and in lot 2, and any right in said land in the complainant is subject to the right of way of the defendant.

And the defendant now also further answering the complainant's second amended bill, shows to the court that the complainant has no power or authority, as this defendant has been informed and believes, and now charges the fact to be, under any articles of incorporation of the complainant to acquire property for public use, or exercise any power of eminent domain for the purpose of constructing any dam along the Deschutes River on any of the lands in the complainant's amended

bill described, or for the purpose of over-flowing any lands above the lands by the complainant claimed; that this defendant has acquired by purchase and is the absolute owner in fee of the following described lands which lie along the Deschutes River and above the lands in the complainant's bill referred to, all which lands have been so acquired and are now held by the defendant for its railway purposes and railway uses, and have been by the defendant devoted to such uses and are necessary therefor, to-wit:

A strip of land 100 feet in width and being 50 feet on each side of the center line of location of defendant's railroad over and across the southeast quarter of the southwest quarter of section 9; the northwest quarter of the southeast quarter of section 17; the west half of the southwest quarter of section 16; the west half of the northwest quarter of section 21; the northeast quarter of the northeast quarter of section 20; the northeast quarter of the southeast quarter of Section 20; the southwest quarter of the northeast quarter of section 32; all in township 4 south, range 14 east, Willamette Meridian.

And in addition thereto this defendant has acquired from the United States, under and pursuant to an act of Congress of the United States of March 3, 1875, hereinbefore referred to, and by virtue of its survey and location and profile maps thereof filed with the Secretary of the Interior of the United States under the said Act of Congress, as hereinbefore referred to, a right of way 100 feet on either side of the center line of location of this defendant's road over certain other public lands of

the United States which lie along the Deschutes River, that is to say, over the following described lands, to-wit:

The south half of the southeast quarter and the southwest quarter of the southwest quarter of section 9, the east half of the northeast quarter and the northeast quarter of the southeast quarter of section 17; the southeast quarter of the northeast quarter and the west half of the southeast quarter of section 20; the west half of the northeast quarter and the west half of the southeast quarter of section 29; the northwest quarter of the northeast quarter and the southeast quarter of the northeast quarter of section 32; the southwest quarter of the northwest quarter and the west half of the southwest quarter of section 33; all in township 4 south, range 14 east, Willamette Meridian.

And the right of way so by the defendant acquired over the said last above described lands is necessary to this defendant for its railway, and over the same and within the boundaries of said right of way this defendant's line of railroad has been located and its line thereover has been completed and has been in operation since November 27, 1910, and this defendant now shows that the complainant has acquired no right to flow the waters of the Deschutes River back upon any of the lands so as aforesaid acquired by this defendant and by it purchased for its railway purposes, or back upon or over the right of way on the said other described lands by this defendant acquired, and has acquired no right, and can acquire no right, to raise the flow of the Deschutes River back upon the lands of this defendant, or over its right of way, or raise the waters of the said Deschutes River above the

natural flow of said river; that this defendant's line of survey and location of its railroad over the said lands so purchased for its use aforesaid, and over the right of way so acquired as aforesaid, was made and adopted by this defendant for its railway purposes and for public uses long prior to any steps taken by the complainant to appropriate any waters of the Deschutes River for power purposes or otherwise, and long prior to any acquisition of any rights of the complainant, if any have been acquired, for such purposes, and long prior to any right in the complainant over any of the properties in the complainant's amended bill described and by the complainant charged as being the owner thereof, or any right, if any has been acquired, by the complainant for the development of any power or for power purposes by the use of the Deschutes River and of any dam thereover for such purposes, and the complainant has no right or power, and has acquired none, to construct any dam or develop any power along the Deschutes River at the point in question and where the complainant by its amended bill claims the right to construct a dam and develop power which will in any way interfere with the survey or location of the line of railroad of this defendant; and this defendant now charges that any dam which the complainant may construct across the Deschutes River, or the development of any power by the use of the waters of the said Deschutes River by means of any such dam at or along or in the neighborhood of any of the lands in the complainant's amended bill described, and charged therein to belong to complainant, will result in the flooding and overflowing of the defendant's said lands by the defendant purchased as aforesaid for its

railway purposes, and now held by the defendant, and by it devoted to public use for such purposes, and of the overflowing of the defendant's right of way hereinbefore referred to, acquired over public lands of the United States, to the great and irreparable injury and damage of this defendant and its line of railroad, and the obstruction and discontinuance of operation of such railroad, and to the great inconvenience of the public in connection therewith, so that, if so it be that the complainant shall intend to construct any such dam as it is by the complainant charged in the complainant's second amended bill, and if so it be that the complainant has any intention of developing power by the use of the waters of the Deschutes River, as in the complainant's amended bill claimed, any such dam or any development of power will result in the flooding of the defendant's properties and premises of this defendant by it devoted and intended to be devoted to its railway uses as aforesaid.

And now all and singular the foregoing matters and things by this defendant alleged are true, as this defendant now avers, all which this defendant is ready and willing to maintain and prove as this Honorable Court shall direct, without this, that any other matter, cause or thing in the complainant's said amended bill contained material or necessary to make answer unto and not hereby well and sufficiently answered, confessed, traversed and avoided, or denied, is true to the knowledge or belief of this defendant; and this defendant now submits, by reason of the matters and things hereinbefore recited and set forth, that the complainant is not

entitled to any relief whatsoever against this defendant. And this defendant now prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained. That in case the court should adjudge that defendant is not entitled to have this suit dismissed, this defendant prays that the court determine the amount of damages sustained by the complainant, or to which the complainant may be entitled by reason of the location and construction of defendant's line over and across the said property, owned or claimed by complainant, and decree that the said complainant shall make, execute and deliver to defendant a good and sufficient deed therefor, upon the payment by the defendant to the complainant of such sum of money as the court shall find.

DESCHUTES RAILROAD COMPANY,
By A. C. SPENCER,
Its Secretary.

(Deschutes Railroad Company)
(Corporate Seal.)

A. C. SPENCER,
W. A. ROBBINS,
JAMES G. WILSON,
Its Solicitors.

United States of America,
State and District of Oregon,—ss.

A. C. Spencer, being first duly sworn, on his oath deposes and says that he is secretary of the Deschutes Railroad Company, the defendant above named; that he has read the foregoing answer to the second amended bill of complaint and knows the contents thereof, and that the same is true.

A. C. SPENCER.

Subscribed and sworn to before me this 29th day of December, 1913.

W. A. ROBINS,
Notary Public for Oregon.

(Notarial Seal)

Service by copy admitted at Portland, Ore., Dec. 29th, 1913.

TEAL, MINOR & WINFREE,
Solicitor for Complt.

Filed Dec. 29, 1913.

A. M. Cannon, Clerk.

And afterwards, to wit, on the 18th day of May, 1914, there was duly filed in said Court and cause, an Opinion, in words and figures as follows, to wit:

OPINION.

A. L. VEAZIE and WIRT MINOR, Portland, Oregon,
Solicitors for Complainant.

JAMES G. WILSON, Portland, Oregon,
Solicitor for Defendant.

A. C. SPENCER, Portland, Oregon,
Solicitor for Defendant.

R. S. BEAN, District Judge:

This is a suit to enjoin and restrain the defendant company from constructing and maintaining its railroad along the Deschutes River and across certain premises

owned by complainant. At the time the suit was commenced the defendant company was engaged in the construction of its road and had its grade practically completed over the premises referred to. The road was located and the work thereon commenced while the land in question, except two small tracts, belonged to or was claimed by the heirs of J. H. Sherar, and the two tracts referred to by the Interior Development Company.

The Deschutes River flows through the property in a deep gorge or canyon and by reason of falls therein, the quantity of water, the uniformity of flow, and the steep and precipitous banks, is valuable for power purposes. The defendant's road is on the side of the canyon about sixty-five feet above low water at the proposed power site. The land actually occupied by it is not shown by the evidence to be of any substantial value, but the position of complainant in effect is that defendant entered into possession under oral agreements or understandings with its predecessors in interest to locate its road so as to permit the maintenance of a sixty-foot dam in the river, but as the road is actually built, fifty-five feet is the maximum height to which a dam can safely be constructed, and as a consequence the value of the water power is greatly impaired, to complainant's damage in a large sum.

The facts are that in 1908 defendant surveyed and located a line of railway across the property following substantially a water grade. In February, 1909, as a result of a conference between the holder of an option to purchase given by Sherar in his life time, and the officers of the defendant, the line was changed by elevating

it for the purpose of protecting the water power. The witnesses are not in accord as to the terms of the agreement, but it is alleged in the amended complaint that it was agreed that the defendant might enter upon the lands in question and "locate and construct its railway over the same provided that the railway should be so located, constructed and maintained over said lands and over the lands above and below said lands that a dam sixty feet in height above ordinary low water in the Deschutes River might be constructed" at any place on the lands in the option described. There was no discussion at the time between the holders of the option and the officers of the defendant as to the consideration to be paid for the right of way, but it seems to have been assumd that the road would be of no damage to the premises provided it did not interfere with the development of the water power.

In pursuance of the agreement referred to the defendant relocated its line in March and April, 1909, at the place where the road was subsequently constructed. It thereafter obtained the consent of the Interior Development Company to enter upon the lands belonging to it and to construct its road according to the relocation survey.

Thereafter and during the summer and fall of 1909, the complainant began negotiations with the holder of the Hostetler option to acquire the right to purchase thereby conferred, and such negotiations resulted in the assignment of the option to it about August 5th of that year. It thereupon employed an engineer to examine the project and report as to its value and availability.

The engineer called upon the defendant company and obtained a profile of the resurveyed line through the property in question, and was advised of the probable elevation thereof above the water. On October 6, 1909, he reported to the complainant company that the levels run by him in connection with the profile indicated that the location of the line was only about sixty feet above the water surface, but he doubted if absolute assurance could be obtained without sending a man to the site to make careful measurements, and in any event he was reasonably certain the railroad company would object to raising its location.

On or about August 25, 1909, the defendant company obtained the consent of the heirs of Sherar to proceed with the construction of its road provided it would build sufficiently high not to interfere with the use of the property for hydraulic purposes, and the holder of the outstanding option should consent, and in case the option should not be taken up, it was to pay them one thousand dollars for the right of way.

About this time Mr. Morrow, the right of way agent of defendant, had an interview with Mr. Martin, president of the complainant company, concerning the right of way over the Sherar property, and claims that he informed Martin of the agreement or understanding with the Sherar heirs, and that Martin consented thereto, and agreed that the defendant company might proceed with the construction of its road according to such understanding. Mr. Martin denies that any such agreement or understanding was had between him and Mr. Morrow. It is manifest, however, that Mr. Morrow so believed, and

the complainant knew that he and his company were acting on such belief and spending large sums of money in reliance thereon, for on the 27th of August, Morrow advised Mr. Huntington, attorney for the Sherar heirs, that the consent of the plaintiff company for the construction of its road had been obtained, and on the same date Huntington wrote to the agents of the complainant in Portland informing them that Morrow had stated that he had seen Martin, who had expressed a willingness that defendant might go upon its land to construct the road, and suggesting that if Martin had not given such consent "Morrow's mind should be disabused of an apparent impression he has received from the conversation" he had with Martin.

No effort was made by complainant to repudiate the alleged agreement, nor to correct the belief under which defendant was acting, but it was permitted to proceed with the work without protest.

The line of the road as relocated pursuant to the agreement or understanding with the holders of the Hostetler option, the Sherar heirs and the Interior Development Company, and the understanding or supposed understanding with the complainant, was formally adopted by defendant in the fall of 1909, and the actual work of construction commenced in September of that year, and was prosecuted from that time with diligence without objection from any one until the grade was substantially completed in the following spring.

About December 1, 1909, and after defendant had thus entered into possession of the property, and while

it was engaged in the construction of its road, complainant acquired the stock of the Interior Development Company, and elected to exercise the right to purchase the Sherar property under the Hostetler option. The deeds from the Sherar heirs to it were deposited in escrow to be delivered upon the payment of the purchase price, but the consideration moving to them was not paid nor the deeds delivered until about April 1, 1910. At that time the grade of the road was practically completed. The deed from the Interior Development Company for the land at the power site was not made to complainant until April 4th of the present year.

It thus appears that notwithstanding complainant had knowledge of defendant's possession, the claims under which it was proceeding, the actual location of its line and the work being done thereon, it allowed the work to proceed without objection until after defendant had expended large sums of money relying on its agreement or supposed agreement with the interested parties including the complainant.

I am therefore inclined to the opinion that under such circumstances the complainant cannot be heard to say that the road was located and constructed at the place where it was actually built without its consent.

But however that may be, the defendant having entered into possession and built its road by the consent or acquiescence of the owners of the property and the holders of the outstanding option, it cannot now be ejected, but the remedy, if any, is restricted to a suit for damages (N. P. Ry. v. Smith, 171 U. S. 260. City of N. Y. v.

Pine, 185 U. S. 93). And as it was in possession and engaged in actual construction at the time complainant purchased and acquired title, the right to proceed against it for the agreed price of the right of way, if there was such an agreement, or for damages if the entry is to *be* deemed unauthorized, or the road located in violation of the agreement with the owners, did not pass to complainant, for as said by the Supreme Court in Roberts vs. N. P. R. R., 158 U. S. 1: "It is well settled that where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burden of the railroad, and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession."

See also Kindred v. U. P. R. R., 225 U. S. 582. Stone v. City of Waukeegan, 205 Fed. 495. 15 Cyc. 795. Maffet v. Quine, 93 Fed. 347. N. P. R. R. v. Murray, 87 Fed. 648.

A contrary doctrine seems to have been announced by the Supreme Court of North Carolina in Phillips vs. Telephone Company (130 N. C. 526) and Beal v. Railroad Company (136 N. C. 298) and perhaps by some other courts, but these decisions are not in harmony with the rule laid down by the Supreme Court which is, of course, controlling here.

It follows therefore that the complaint should be dismissed and it is so ordered.

Filed May 18, 1914.

A. M. Cannon, Clerk.

And afterwards, to wit, on the 12th day of October, 1914, there was duly filed in said Court and cause, an Opinion on Petition for re-hearing, in words and figures as follows, to wit:

OPINION OF PETITION FOR REHEARING.

A. L. VEAZIE and WIRT MINOR, Portland, Oregon, Solicitors for Complainant.

JAMES G. WILSON, Portland, Oregon, Solicitor for Defendant.

R. S. BEAN, District Judge:

Aided by the arguments and briefs of counsel, I have re-examined the questions involved to the end that, if possible, the rights of the parties may be settled in this suit without the need of further litigation, and my conclusions in brief are as follows:

The flow line of the proposed power plant on the Deschutes River is fixed and determined by the location of the defendant's railway over and across lots 1 and 2, Section 3, Township 4 south, Range 14 east. At the time it was built lot 1 and the northeast quarter of the southeast quarter of section 9 belonged to and was the property of the Interior Development Company, and

lot 2 above referred to and the north half of the southwest quarter of Section 35, Township 3 south, Range 14 east, was public land of the United States. The defendant's road is on these lands along the east bank of the river and opposite the dam site, partly on lot 1 and partly on lot 2, about sixty-five feet above low water. It was built on lot 1 and the northeast quarter of the southeast quarter of Section 9, in pursuance of an agreement with the Interior Development Company, the then owner of the land, that it should be located at the place where it now is. Complainant acquired title to lot 1 long after the road was built and this suit commenced, with knowledge of the location of the road. It is therefore clearly bound by the agreement between its predecessor in interest and the defendant and is not entitled to damages because it is prevented by the road as so located from constructing a dam in the river which will cause an overflow of defendant's track. (Boston Chamber of Commerce vs. Boston, 219 U. S. 194. McGovern vs. New York, 229 U. S. 363).

Lot 2 and the north half of the southwest quarter of Section 35 was and remained public land of the United States until 1913, long after this suit was begun. In 1908, the defendant railroad company, in compliance with the Act of March 3, 1875, granting rights of way through public lands to railway companies, filed with the Land Department a map of definite location of its road, together with its Articles of Incorporation and proof of organization, and this map was duly approved by the Secretary of the Interior in June, 1910. It thereby obtained a right of way to the extent of one hundred feet

on each side of the center line of its road as shown on such map, and the approval by the Secretary of the Interior was equivalent to a patent from the government to the route delineated thereon. (Oregon Trunk vs. Deschutes R. Co., 172 Fed. 738.) In my judgment the subsequent approval of a prior application of the Santa Fe Railroad Company by its attorney in fact to select such lands in lieu of other lands under the Act of June 4, 1897, did not relate back to the date of the application and supersede the rights of the railway company acquired by the approval of its map of definite location. The right of selection given by the Act of June 4, 1897, is but an offer by the government to exchange one tract of land for another and the selector obtains no right or interest to the lands selected by him until the offer is accepted by the proper government officers. His rights in this respect are, I think, to be distinguished from those of a settler under the homestead or preemption laws or a claimant under the mining laws, or the rights of a railway company under a Congressional Grant to aid in the construction of its road in lieu of lands which are lost in place limits. (Daniel vs. Wagner, 205 Fed. 235. Roughton vs. Knight, 219 U. S. 537.)

I conclude therefore that the complainant is not entitled to damages on account of the impairment of its water power due to the location of defendant's railway over and across Lots 1 and 2, or the interference with its proposed power house site within the limits of the railroad right of way through the north half of the southwest quarter of Section 35.

The remaining question is whether complainant can recover in this suit damages for the location of the defendant's road through the other lands described in the complaint and if so, the amount thereof. As the defendant company was in possession by the consent and acquiescence of the owners and had partially completed the grade of its road at the time the complainant acquired an interest in the property, I doubt if it has any right of recovery against the defendant on account thereof, but inasmuch as the complainant purchased in pursuance of an option outstanding at the time the defendant entered into possession, of which it had knowledge, and since the defendant's entry was in pursuance of an understanding with the owners that if the option should be taken up it would be required to settle with the purchaser for the right of way, I have concluded that I probably was in error in holding in the former opinion that in this equitable proceeding the right to damages for the taking is in the former owner and not the complainant.

The evidence shows that the defendant railway is located along the sides of a steep canyon over land of but little if any substantial value. There is no evidence in the record as to the quantity of land occupied by the road nor its value, but since the defendant admits and alleges that it agreed to pay the Sherar heirs a thousand dollars for the right of way in case the holder of the option did not purchase, I assume in the absence of other evidence that such an amount is a reasonable compensation to be paid for the land taken.

A decree will therefore be entered adjudging that defendant is the owner of a right of way 200 feet wide

over and across the north half of the southwest quarter of Section 35, Township 3 south, Range 14 east, and Lot 2, Section 3, Township 3 south, Range 14 east, as shown on the map of definite location filed and approved by the Secretary of the Interior, and that complainant's title to such property is subsequent and subject to such right of way.

Second: That defendant is entitled to maintain its road over and across Lot 1, Section 3, and the northwest quarter of the southeast quarter of Section 9, Township 4 south, Range 14 east, together with the necessary slopes, cuts and supports therefor in accordance with its agreement with the Interior Development Company, and that the complainant should be enjoined and restrained from interfering therewith.

Third: That upon the payment into court by the defendant of the sum of one thousand dollars within thirty days a decree will be entered in its favor for a right of way over and across the other lands belonging to the complainant and described in the complaint, where its road is now located, with the necessary cuts, slopes and supports therefor, but in case of a failure to make such payment, it will be enjoined and restrained from occupying or using such right of way.

Fourth: That as defendant made no tender to cover the damages prior to the commencement of the suit, complainant should have judgment for its costs and disbursements. (Section 6868 Lord's Oregon Laws, 1; 15 CYC 1015.)

Filed October 12, 1914.

G. H. Marsh, Clerk.

And afterwards, to-wit, on Monday, the 16th day of November, 1914, the same being the 13th judicial day of the regular November term of said Court; present, the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

FINAL DECREE

This cause came on to be heard at this time and was argued by counsel and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED AND DECREED, as follows, to-wit:

That the defendant is the owner of a right of way two hundred feet in width, being one hundred feet on each side of the center line of its railroad track as constructed over and across the north half of the southwest quarter (N½ of SW¼) of Section 35, Township 3 South of Range 14 East of the Willamette Meridian, and Lot Two (2) of Section three (3), Township 4 South of Range 14 East of the Willamette Meridian, and that the title of complainant to said property was acquired subsequent to the acquirement of said right of way of defendant over said property and the same is subject to such right of way, provided, however, that the right hereby decreed to defendant shall not be understood or considered to interfere with or deprive complainant or its successor in interest of the right to construct and maintain a dam for hydraulic purposes in the Deschutes River where it passes through such property

and installing in connection therewith appliances for the purpose of developing hydraulic and electric power for all purposes, provided the track or roadbed of defendant shall not thereby be flooded or damaged, or the operating of its road interfered with.

That defendant's line of railroad was constructed over and across lot one (1) of section three (3), and the northeast quarter of the southeast quarter (NE¼ of SE¼) of section 9, township 4 south of range 14 east of the Willamette Meridian, at the place where it is now located pursuant to and in accordance with an agreement entered into between the defendant and the Interior Development Company, the owner of the tract of land at the time of said agreement with the defendant, and at the time of the entry thereon and the construction thereover of defendant's line of railroad, it being understood and agreed that the location of defendant's track should not interfere with or deprive the Development Company and its successor in interest of the right to construct and maintain a dam in the Deschutes River where it flows through such property, for hydraulic purposes, and to install in connection therewith appliances for the purpose of developing hydraulic and electric power for all purposes, provided, however, that the track and roadbed of defendant should not thereby be flooded or damaged or the operation of its road interfered with.

That complainant acquired the title to lot one (1) of section 3 and the northeast quarter of the southeast quarter (NE¼ of SE¼) of section 9, township 4 south of range 14 east of the Willamette Meridian, after the construction thereover of the defendant's line of rail-

road and subject to defendant's right of way thereover, and the defendant is hereby decreed to be the owner of a right of way over and across said lands for its tracks and roadbed and the slopes and cuts thereof and the necessary and safe support therefor, and for the safe and convenient operation of its line as hereinbefore set out, and it is ADJUDGED AND DECREED that the complainant, its officers, agents, servants and employees, and all persons acting by, under or for it, be and they are hereby restrained and enjoined from in any manner interfering with the maintenance of said railroad over said lands, and from interfering with or obstructing in any manner the operation of said line of railroad over said property, except as permitted by this decree.

It appearing to the Court that the defendant has paid into the registry of this court the sum of one thousand dollars in accordance with the opinion of this Court, rendered and filed on the 12th day of October, 1914, it is hereby ORDERED, ADJUDGED AND DECREED that said defendant be, and it is hereby, decreed to be the owner of a right of way for its line of railroad as now constructed over and across the following described lands, to-wit:

The southeast quarter (SE¼) of section 34, township 3, south of range 14 east of the Willamette Meridian; the southwest quarter of the northeast quarter (SW¼ of NE¼), the west half of the southeast quarter (W½ of SE¼), the east half of the southwest quarter (E½ of SW¼) of section 3; the northwest quarter and the northwest quarter of the south-

west quarter (NW¼ and NW¼ of SW¼) of section 10, all in township 4 south of range 14 east of the Willamette Meridian, and that the defendant, its lessees, successors and assigns be and they are hereby declared to have the right to maintain the railroad of defendant as now located and constructed over said lands, together with necessary cuts, slopes and safe supports therefor, and the right to maintain and operate its trains thereover without interference on the part of complainant, its officers, agents, servants or employees, in any manner whatsoever, except as permitted by this decree.

It is further ADJUDGED AND DECREED, That the line of railroad of the defendant, Deschutes Railroad Company, does not cross or touch the west half of the southwest quarter (W½ of SW¼) of section 27, township 3 south of range 14 east of the Willamette Meridian; nor the southeast quarter of the northwest quarter (SE¼ of NW¼) of section 3, the northwest quarter of the southeast quarter (NW¼ of SE¼), the northeast quarter of the southwest quarter (NE¼ of SW¼), the northwest quarter of the southwest quarter (NW¼ of SW¼), of section 9, and the northeast quarter of the southeast quarter (NE¼ of SE¼) of section 8, all in township 4 south of range 14 east of the Willamette Meridian, and said lands are immaterial to this controversy.

It is further ORDERED AND ADJUDGED that complainant have and recover of defendant its costs and disbursements incurred herein, taxed and allowed in the sum of Five Hundred Thirteen 22/100 Dollars,

and that execution or other proper writ for the collection thereof issue.

Done and dated in open Court this 14th day of November, A. D. 1914.

R. S. BEAN,
Judge.

Filed November 16, 1914.

G. H. Marsh, Clerk.

And after wards, to-wit, on the 14th day of May, 1915, there was duly filed in said Court, and cause, a Petition of the Eastern Oregon Land Company for Appeal, in words and figures as follows, to-wit:

PETITION OF EASTERN OREGON LAND COMPANY FOR APPEAL.

To the Honorable Robert S. Bean, District Judge:

The above named plaintiff feeling aggrieved by the decree rendered and entered in the above entitled cause dated the 14th day of November, 1914, and entered on the 16th day of November, A. D. 1914, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignments of error filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting

at San Francisco, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

EASTERN OREGON LAND COMPANY,
By VEAZIE, McCOURT & VEAZIE,
Its Solicitors.

Appeal allowed upon giving bond as required by law, for the sum of $500.00.

WIRT MINOR.
VEAZIE, McCOURT & VEAZIE,
Solicitors for Complainant.

R. S. BEAN,
Judge.

Filed May 14, 1915.
G. H. Marsh, Clerk.

And afterwards, to-wit, on the 14th day of May, 1915, there was duly filed in said Court, and cause, an Assignment of Errors on the Appeal of the Eastern Oregon Land Company, in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS ON APPEAL OF THE EASTERN OREGON LAND COMPANY.

Now comes the plaintiff in the above entitled cause and files the following assignment of errors upon which

it will rely upon the prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court dated the 14th day of November, 1914, and entered the 16th day of November, 1914:

FIRST: That the United States District Court for the District of Oregon erred in finding and decreeing that the defendant is the owner of a right of way two hundred feet in width, or of any width, whatsoever, being one hundred feet on each side of the center line of its railroad track, or any width whatsoever on each side of said center line, as constructed over or across the North half of the Southwest quarter (N½ of SW¼) of Section 35, Township 3 South of Range 14 East of the Willamette Meridian, and Lot two (2) of Section three (3), Township 4 South of Range 14 East of the Willamette Meridian, or any part of said lands.

SECOND: That the United States District Court for the District of Oregon erred in finding and decreeing that the title of plaintiff to said property described in the foregoing assignment of error was acquired subsequent to the acquirement of said right of way of defendant over said property.

THIRD: That the United States District Court for the District of Oregon erred in finding and decreeing that the title of the plaintiff to said real property described in the first assignment of error, to-wit, the North half of the Southwest quarter (N½ of SW¼) of Section 35, Township 3 South of Range 14 East of the Willamette Meridian, and Lot two (2) of Sec-

tion Three (3), Township 4 South of Range 14 East of the Willamette Meridian, or any part thereof, is subject to the right of way of the defendant.

FOURTH: That the United States District Court for the District of Oregon erred in finding and decreeing that the right of the plaintiff to construct and maintain a dam for hydraulic purposes in the Deschutes River where it passes through said lands, to-wit, the North half of the Southwest quarter (N½ of SW¼) of Section 35, Township 3 South of Range 14 East of the Willamette Meridian, and Lot two (2) of Section three (3), Township 4 South of Range 14 East of the Willamette Meridian, and to install in connection therewith appliances for the purpose of developing hydraulic and electric power for all purposes, is subject to a condition that the track and roadbed of the defendant shall not be thereby flooded or damaged, or the operation of its railroad interfered with, or to either or any of said conditions.

FIFTH: That the United States District Court for the District of Oregon erred in finding and decreeing that the defendant's line of railroad was constructed over or across Lot one (1) of Section three (3), and the Northeast quarter of the Southeast quarter (NE¼ of SE¼) of Section 9, Township 4 South of Range 14 East of the Willamette Meridian, or any part of said real property, at the place where it was at the time of the entry of said decree located pursuant to or in accordance with any agreement entered into between the defendant and the Interior Development Company, as the owner of said land at the time of the said agreement;

and erred in finding that any such agreement was ever made between the defendant and said Interior Development Company other than the agreement set forth in paragraph IX of the second amended complaint.

SIXTH: That the United States District Court for the District of Oregon erred in finding and decreeing that the right of the plaintiff to construct and maintain a dam in the Deschutes River where it flows through Lot one (1) of Section three (3), and the Northeast quarter of the Southeast quarter of Section 9, Township 4 South of Range 14 East of the Willamette Meridian, or either of said tracts, for hydrulic purposes, is subject to any condition that the track or roadbed of the defendant should not thereby be flooded or damaged or the operation of its railroad interfered with, or to either or any of said conditions.

SEVENTH: That the United States District Court for the District of Oregon erred in finding and decreeing that plaintiff acquired the title to Lot one (1) of Section three (3) and the Northeast quarter of the Southeast quarter of Section 9, Township 4 South of Range 14 East of the Willamette Meridian, or any part of said lands, after the construction thereover of the defendant's line of railroad; and also erred in finding and decreeing that plaintiff's said acquisition of said title was subject to defendant's right of way thereover or over any part of said lands.

EIGHTH: That the United States District Court for the District of Oregon erred in finding and decreeing that defendant is the owner of a right of way over

and across said Lot one (1) of Section three (3) and the Northeast quarter of the Southeast quarter of Section 9, Township 4 South of Range 14 East of the Willamette Meridian, or any part of said lands, for its tracks or roadbed, or the slope or cuts thereof, or the necessary or safe or any support thereof, or for the safe or convenient or any operation of its line of railroad, as in said decree set forth, or at all.

NINTH: That the United States District Court for the District of Oregon erred in adjudging and decreeing that the plaintiff, its officers, agents, servants, or employees, or any or all persons acting by, under or for it, be and are by said decree restrained and enjoined from in any manner interfering with the maintenance of said railroad over said lands or from interfering with or obstructing in any manner the operation of said line of railroad over said property, except as permitted by said decree, or otherwise; and erred by interfering in any wise by injunction with the full, complete and free use of the said property by the plaintiff.

TENTH: That the United States District Court for the District of Oregon erred in decreeing that the defendant is the owner of a right of way for its railroad as constructed over or across the following described lands, or any part thereof, to-wit, the Southeast quarter of Section 34, Township 3 South of Range 14 East of the Willamette Meridian, the Southwest quarter of the Northeast quarter, the West half of the Southeast quarter, the East half of the Southwest quarter of Section 10, all in Township 4 South of Range 14 East

of the Willamette Meridian; and in finding and decreeing that the defendant, its lessees, successors or assigns, be and are declared to have the right to maintain the railroad of the defendant as located and constructed over said lands or otherwise or at all, together with the necessary or any cuts, slopes, or supports therefor, or the right to maintain or operate its trains thereover without interference on the part of the plaintiff, its officers, agents, servants, or employees in any manner whatsoever, or at all, except as permitted by said decree, or otherwise.

ELEVENTH: That the United States District Court for the District of Oregon erred in failing to find, adjudge and decree that the plaintiff is the absolute owner, free and clear of any right, interest or easement of the defendant, of the North half of the Southwest quarter of Section thirty-five (35), Township 3 South of Range 14 East of the Willamette Meridian, and of Lot two (2) of Section three (3), Township 4 South of Range 14 East of the Willamette Meridian.

TWELFTH: That the United States District Court for the District of Oregon erred in failing to find, adjudge and decree that the title of plaintiff to the said real property, to-wit, the North half of the Southwest quarter of Section 35, Township 3 South of Range 14 East of the Willamette Meridian, and Lot two (2) of Section 3, Township 4 South of Range 14 East of the Willamette Meridian, was initiated prior to the initiation of any title to any right of way in the defendant over or across said lands and by relation back

to the date of its initiation is superior to and prevails over the rights acquired by the said defendant under and through its subsequently initiated application for a right of way thereover.

THIRTEENTH: That the United States District Court for the District of Oregon erred in failing to find, adjudge and decree that the right of way permit granted by the United States to the said defendant over and across said lands, to-wit, The North half of the Southwest quarter (N½ of SW¼) of Section 35, Township 3 South, Range 14 East of the Willamette Meridian, and Lot two (2) of Section 3, Township 4 South of Range 14 East of the Willamette Meridian, is void as against the title to said lands which passed to the plaintiff under the patent of the United States based upon the selection in the interest of its predecessor in title to said lands prior to the initiation of any proceedings to obtain a permit and easement for a right of way over and across the same from the United States to the defendant.

FOURTEENTH: That the United States District Court of the State of Oregon erred in failing to find, adjudge and decree that the plaintiff has the absolute right, as against the defendant, to construct and maintain a dam for hydraulic purposes in the Deschutes River, where it passes through the lands involved in this suit, to the full height of sixty (60) feet above low water mark at the proposed site of construction of said dam or such site as may be selected therefor on said lands, and that the defendant has no right, by the location of

its railroad over and across the said lands, or otherwise, to interfere with the construction of a dam to such height of sixty feet.

FIFTEENTH: That the United States District Court for the District of Oregon erred in not finding and decreeing that by the terms of the agreement between the plaintiff's predecessors in interest, to-wit, B. F. Laughlin and the executors of the estate of J. H. Sherar, deaceased, and the said defendant, the said defendant had no right to enter upon or to construct a railroad over any of the lands of the plaintiff in the complaint described and acquired by the plaintiff from the estate of J. H. Sherar, deceased, otherwise that at such a height as would permit, without interference by said railroad, of the construction and maintenance of a dam in the Deschutes River at a site to be chosen therefor upon said lands to a height of sixty feet above ordinary low water mark in said river, and except upon condition further that the defendant should obtain the consent of the plaintiff thereto and make full compensation for all lands taken and for all damages to the lands, and that no right to build or to construct and maintain a railroad over said lands should be granted or acquired unless the railroad should be located as above provided and unless and until full damages and compensation were paid as above provided; and erred in failing to find and decree that no consent of the plaintiff to the construction and maintenance of said railroad over said lands or any part thereof was ever obtained by the defendant.

SIXTEENTH: That the United States District Court for the District of Oregon erred in failing to find

and decree that the railroad of the defendant as constructed and located over and across the lands of the plaintiff described in the complaint does interfere with and prevent the construction and maintenance of a dam for hydraulic and hydro-electric development purposes upon said lands at the proper and feasible place for the location of such a dam to any greater height than 55 feet above ordinary low water mark in said Deschutes River, and does thereby, through such curtailment of the height of said dam, greatly impair the value of said lands for water power purposes in a sum not less than Twenty-five Thousand Dollars ($25,000).

SEVENTEENTH: That the United States District Court for the District of Oregon erred in failing to find and decree that the said railroad of defendant, as located and constructed over and across the lands of the plaintiff described in the complaint herein, was so located and constructed in violation of the terms and agreement as to the location and construction of the same which the defendant had entered into with the predecessors in title of plaintiff to said lands, namely, B. F. Laughlin, the Interior Development Company, and the executors of the estate of J. H. Sherar, deceased, to locate and construct its railroad over said lands at an elevation above the Deschutes River which would admit of the construction of a dam in said Deschutes River and particularly where said river flows through the Northwest quarter of the Northeast quarter of Section 3 above the falls of said river, to the full height of sixty feet above ordinary low water mark; but is located, constructed and maintained so that the same

prevents the construction and maintenance of a dam at said point to exceed 55 feet in height above ordinary low water mark without interference with said defendant's railroad.

EIGHTEENTH: That the United States District Court for the District of Oregon erred in failing to find and decree that by the construction and maintenance of defendant's railroad at the height and in the manner that the same is constructed and maintained through said lands of the plaintiffs, the value of the lands of the plaintiff is greatly impaired, to-wit, in a sum not less than Seventy-five Thousand Dollars ($75,000).

NINETEENTH: That the United States District Court for the District of Oregon erred in failing to find and decree that the defendant is, by its agreement alleged in the second amended complaint herein and established by the evidence in the cause entered into with the plaintiff's predecessors in title respecting the construction of its railroad, to-wit, that it would construct its railroad in such a manner and at such a height as not to interfere with the construction and maintenance of a dam not less than sixty feet in height at a place to be selected in the Northwest quarter of the Northeast quarter of Section 3, and above the falls in said river, referred to in the second amended complaint herein, estopped and should not be heard to say that the erection and maintenance of a dam sixty feet in height above ordinary low water mark on the Deschutes River at the said point would flood any of the lands of

the defendant or interfere with the construction, maintenance or operation of the railroad of the defendant or any of the lands of the defendant lying above the lands of the plaintiff in the second amended bill of complaint described.

TWENTIETH: That the United States District Court for the District of Oregon erred in failing to find and decree that the pretended grant of a right of way permit from the United States to the defendant over and across the North half of the Southwest quarter of Section 35, Township 3 South of Range 14 East of the Willamette Meridian, and Lot 2 of Section 3, Township 4 South of Range 14 East of the Willamette Meridian, under and in pursuance of the Act of Congress of March 3rd, 1875, entitled "An Act Granting to Railroads a right of way to Public Lands of the United States," was null and void as against the plaintiff, for the reason that the said lands and all of them were, at the time of the pretended grant of said right of way permit, and also at the time of the application therefor, in the possession and occupancy of the plaintiff's predecessor in title from whom plaintiff derives title, namely, J. H. Sherar, and were covered at all said times by pending forest reserve lieu selections made in behalf of the said J. H. Sherar, plaintiff's predecessor in title, which said forest reserve lieu selections have since passed to patent, whereby title to said lands has become vested in the plaintiff, with a right prior and superior to any right of the defendant in said lands.

TWENTY-FIRST: That the United States District Court for the District of Oregon erred in fixing

the compensation and damages to be paid by the defendant for the appropriation of the lands of the plaintiff appropriated to the defendant by said decree for railroad purposes at One Thousand Dollars ($1,000) or at any less sum than One Hundred and Twenty-five Thousand Dollars.

TWENTY-SECOND: That the United States District Court for the District of Oregon erred in decreeing to the defendant under any circumstances a right of way of greater width than one hundred feet, to-wit, fifty feet on each side of the center line of its railroad track over and across said North half of the Southwest quarter of Section 35, Township 3 South of Range 14 East of the Willamette Meridian, and Lot 2 of Section 3, Township 4 South of Range 14 East of the Willamette Meridian, or any part thereof.

TWENTY-THIRD: That the United States District Court for the District of Oregon erred in decreeing to the defendant a right of way over and across the said lands, to-wit, the North half of the Southwest quarter of Section 35, Township 3 South of Range 14 East of the Willamette Meridian, and Lot 2 of Section 3, Township 4 South of Range 14 East of the Willamette Meridian, or any part thereof, without the payment of reasonable compensation and damages therefor, to-wit, without the payment of a sum not less than One Hundred and Twenty-five Thousand Dollars ($125,000) as such compensation and damages, in consideration of the dimunition of the value of said property for water power purposes, caused by the operation of said

railroad as located and constructed thereon, and by the increased cost of construction of a hydraulic project there occasioned by the construction and maintenance of said railroad, and by the debris cast upon said property in connection therewith.

EASTERN OREGON LAND COMPANY,
By A. L. VEAZIE,
Its Solicitor.

WIRT MINOR,
VEAZIE, McCOURT & VEAZIE,
Plaintiff's Solicitors.

District of Oregon,
County of Multnomah,—ss.

Due service of the within Assignment of Errors is hereby accepted in Multnomah County, Oregon, this .... day of May, 1915, by receiving a copy thereof, duly certified to as such by

A. L. VEAZIE,
One of the Attorneys for the Plaintiff.

W. A. ROBBINS,
One of Attorneys for Defendant.

Filed May 14, 1915.

G. H. Marsh, Clerk.

And afterwards, to-wit, on the 14th day of May, 1915, there was duly filed in said Court, and cause, a Bond on Appeal of the Eastern Oregon Land Company, in words and figures as follows, to-wit:

BOND ON APPEAL OF THE EASTERN OREGON LAND COMPANY.

KNOW all men by these presents, that we, EASTERN OREGON LAND COMPANY, as principal, and WALTER J. BURNS, of Portland, Oregon, as surety, are held and firmly bound unto Deschutes Railroad Company, a corporation, in the sum of Five Hundred Dollars ($500) lawful money of the United States, to be paid to it or its successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our successors, heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 14th day of May, 1915.

WHEREAS the above named Eastern Oregon Land Company has prosecuted an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit to reverse the judgment and decree of the District Court of the United States for the District of Oregon in the above entitled cause.

NOW, THEREFORE, the condition of this obligation is such that if the above named Eastern Oregon Land Company shall prosecute its said appeal to effect and answer all costs if it fail to make good its appeal,

then this obligation shall be void; otherwise to remain in full force and effect.

EASTERN OREGON LAND COMPANY,
By BALFOUR GUTHRIE & CO.,
Its Agents.

WALTER J. BURNS,
Surety.

State of Oregon,
County of Multnomah,—ss.

On the 14th day of May, 1915, personally appeared before me Walter J. Burns, known to me to be the individual described in and duly executed the foregoing instrument as surety, and acknowledged that he executed the same as his free act and deed for the purposes therein set forth.

And the said Walter J. Burns, being by me duly sworn, says that he is a resident and householder of the said County of Multnomah and that he is worth the sum of One Thousand Dollars over and above his just debts and legal liability and property exempt from execution.

WALTER J. BURNS.

Subscribed and sworn to before me this 14th day of May, 1915.

A. L. VEAZIE,
(Seal) Notary Public for Oregon.

The within bond is approved both as to sufficiency and form this 14th day of May, 1915.

R. S. BEAN,
Judge.

Filed May 14, 1915,

G. H. Marsh, Clerk.

And afterwards, to-wit, on the 15th day of May, 1915, there was duly filed in said Court, and cause, a Petition of the Deschutes Railroad Company for Appeal, in words and figures as follows, to-wit:

PETITION OF DESCHUTES RAILROAD COMPANY FOR APPEAL.

The Deschutes Railroad Company, a corporation, the above named defendant, considering itself aggrieved by the final decree, order and judgment, dated the 14th day of November, 1914, and filed and entered in the above entitled cause on the 16th day of November, 1914, hereby appeals from said final decree, order and judgment, and particularly that portion thereof wherein and whereby it is decreed, ordered, and adjudged, that complainant have and recover of defendant its costs and disbursements incurred, taxed, and allowed in the sum of $513.32, and that execution or other proper writ for the collection thereof should issue, and said defendant appeals to the United States Circuit Court of Appeals for the Ninth Circuit and prays that this its appeal to the said United States Circuit Court of Appeals for the Ninth Circuit may be allowed, and that a transcript of

the records, and proceedings upon which said final decree, order and judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and now at the time of filing this petition for appeal, the Deschutes Railroad Company, appellant, files an assignment of errors, setting up separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray.

Dated at Portland, Oregon, this 15th day of May, A. D. 1915.

DESCHUTES RAILROAD COMPANY,
Appellant,

By A. C. SPENCER, W. A. ROBBINS,
JAMES G. WILSON,
Its Solicitors.

Service by copy admitted at Portland, Oregon, May 15, 1915.

A. L. VEAZIE,
Attorney for Complainant.

Filed May 15, 1915.

G. H. Marsh, Clerk.

And afterwards, to-wit, on the 15th day of May, 1915, there was duly filed in said Court, and cause, an Assignment of Errors on the Appeal of the Deschutes Railroad Company, in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS ON APPEAL OF DESCHUTES RAILROAD COMPANY.

The Deschutes Railroad Company, the above named defendant, having this date petitioned for an appeal from the final decree, order and judgment, dated November 14, 1914, and filed and entered on the 16th day of November, 1914, in the above entitled cause, hereby submits and herewith files its Assignment of Errors asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit, and says that in the record and proceeding aforesaid there is manifest error in this:

I.

That the United States District Court for the District of Oregon erred in adjudging and decreeing that the complainant have and recover of defendant costs and disbursements incurred by the complainant in said cause.

II.

That the said court erred in not adjudging and decreeing that the defendant have and recover of and from the complainant costs and disbursements incurred by said defendant in said cause.

III.

That the said Court erred in treating said suit as a condemnation suit and in holding and deciding that inasmuch as defendant made no tender to cover the dam-

ages prior to the commencement of the suit, complainant was entitled to recover its costs and disbursements under Section 6868, Lord's Oregon Laws.

IV.

That the said court erred in decreeing and adjudging costs to the complainant and against the defendant as a matter of right under and by virtue of Section 6868, Lord's Oregon Laws.

V.

That it was an abuse of discretion on the part of the court to decree and adjudge the costs in this case in favor of the complainant and against the defendant in that this was a suit for an injunction to restrain the defendant from operating its railroad over certain land claimed to be owned by complainant. That as to all but a small portion of said lands, said title was disputed by defendant and the title claimed by the defendant, and that as to all of the lands, title of which was in dispute, the decision of the court was in favor of the defendant and against the complainant, and that it was an abuse of the court's discretion to decree costs to the complainant and against the defendant as to all of the lands, title to which the court found to be in the defendant.

The said Deschutes Railroad Company prays that the decree, order, and judgment aforesaid may be reversed.

DESCHUTES RAILROAD COMPANY,
Appellant,

By A. C. SPENCER, W. A. ROBBINS,
JAMES G. WILSON,

Its Solicitors.

Service by copy admitted at Portland, Oregon, May 15, 1915.

A. L. VEAZIE,
Attorney for Complainant.

Filed May 15, 1915.

G. H. Marsh, Clerk.

And afterwards, to-wit, on Saturday, the 15th day of May, 1915, the same being the 67th Judicial day of the Regular March Term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER ALLOWING APPEAL OF DESCHUTES RAILROAD COMPANY.

Now on this 15th day of May, 1915, the petition of defendant, Deschutes Railroad Company, for an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree, order and judgment, and particularly that portion thereof wherein and whereby it is decreed, ordered, and adjudged, that complainant have and recover of defendant its costs and disbursements incurred, taxed and allowed in the sum of $513.32, and that execution or other proper writ for the collection thereof should issue, which

said decree was rendered and dated in this cause by this court on the 14th day of November, 1914, and filed and entered on the 16th day of November, 1914, coming on regularly for hearing, and the court being fully advised in the premises,

It is hereby ORDERED that said appeal be and the same hereby is allowed, and bond for costs fixed in the sum of $500.00.

R. S. BEAN,

Judge of the District Court of the United States for the District of Oregon.

Service by copy admitted at Portland, Oregon, May 15, 1915.

A. L. VEAZIE,
Attorney for Complainant.

Filed May 15, 1915.

G. H. Marsh, Clerk.

And afterwards, to-wit, on the 15th day of May, 1915, there was duly filed in said Court, and cause, a Bond on Appeal of the Deschutes Railroad Company, in words and figures as follows, to-wit:

BOND ON APPEAL OF DESCHUTES RAILROAD COMPANY.

KNOW ALL MEN BY THESE PRESENTS, that we, the Deschutes Railroad Company, a corporation, as principal, and the National Surety Company, a

corporation, as surety, are held and firmly bound unto the Eastern Oregon Land Company, a corporation, jointly and severally, in the sum of Five Hundred Dollars ($500.00), to be paid to the said Eastern Oregon Land Company, its successors and assigns, to which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and our and each of our successors and assigns, firmly by these presents.

SEALED with our seals and dated this 14th day of May, A. D. 1915.

Whereas the above named Deschutes Railroad Company has appealed to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree and judgment in the above entitled cause by the District Court of the United States for the District of Oregon, dated and signed the 14th day of November, 1914, and filed and entered on the 16th day of November, 1914.

NOW THEREFORE, the condition of this obligation is such that if the above named Deschutes Railroad Company, appellant, shall prosecute said appeal to effect and answer all costs awarded against it, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

DESCHUTES RAILROAD COMPANY,
By J. P. O'Brien, Vice-President.
Attest: A. C. Spencer, Secretary.

(Corporate Seal)

NATIONAL SURETY COMPANY,
By MARC HUBBERT,
Its Attorney in Fact.

(Corporate Seal)

The foregoing bond is hereby approved this 15th day of May, A. D. 1915.

R. S. BEAN,
Judge.

Service by copy admitted at Portland, Oregon, May 15, 1915.

A. L. VEAZIE,
Attorney for Complainant.

Filed May 15, 1915.

G. H. Marsh, Clerk.

And afterwards, to-wit, on the 29th day of March, 1916, there was duly filed in said Court, Statement of Evidence in words and figures as follows, to-wit:

STATEMENT OF EVIDENCE.

In the District Court of the United States for the District of Oregon.

Eastern Oregon Land Company, a corporation,
Complainant,

vs.

Deschutes Railroad Company, a corporation,
Defendant.

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, as follows:

That the Eastern Oregon Land Company, the complainant herein, is and was, at all the times mentioned in the complaint, a corporation organized under the laws of the State of California, and authorized to do business under the laws of Oregon; and that the purposes for which the said corporation is organized as specified in its Articles are as follows:

To purchase, sell, exchange, lease, mortgage, pledge, and otherwise incumber, and deal in lands, water rights and water privileges, and interests in lands, water rights and water privileges, of every kind and nature whatsoever, situate in the State of Oregon, and elsewhere, and in general to engage in and carry on the business of dealing and operating in real estate, in every mode and form, and to any and every extent whatsoever, including also the business of buying, selling, exchanging, pledging and otherwise incumbering, and dealing in any and all mineral ores, vegetable substances, and other articles of profit, use or mechanical, scientific, or other service or manufacture, which may be found in or upon said lands, or developed therefrom.

Also the business and occupation of buying and selling timber, and lumber, and of cutting and sawing timber, and of manufacturing lumber for the purpose of trade and commerce.

To generate and manufacture, by means of the water of the Deschutes River, and other streams and lakes in Oregon and elsewhere, electric power, and to distribute and sell electric power so manufactured or obtained by it, and to own, maintain, and operate power transmission lines, stations and apparatus in connection therewith; and to contract with municipal railway corporations and other corporations, associations, firms or persons engaged in the operation of railways, and other businesses requiring the use of electric light and power, for the supply and sale of electric power and electric light; and to acquire, hold, use and enjoy franchises from municipalities for the purpose of supplying such municipalities and their inhabitants with electric power and electric light; and to acquire, own, hold, dispose of, lease, encumber and enjoy, either by purchase, lease, conveyance, mortgage, or other instrument or condemnation, all lands or interests in lands and riparian rights and privileges that it may deem necessary, expedient or convenient so to acquire, own, hold, dispose of, lease, incumber or enjoy, for rights of way for ditches, canals, flumes, water lines, transmission, power and light lines, sites for power houses, stations, dams and reservoirs for, and to maintain the same for storing, raising, generating, transmitting, owning, holding, or enjoying the waters of said Deschutes River, and said other rivers, streams, lakes and bodies of water, for the manufacture, distribution or disposition of such electric power and light as aforesaid, and to acquire, own, purchase, sell, incumber, or otherwise dispose of and enjoy water for irrigation, household or domestic consumption, watering livestock upon dry lands, and other legitimate purposes and to

use the waters of said Deschutes River, and other rivers, streams and lakes in said State of Oregon and elsewhere, for any and all legitimate purposes not hereinabove specified; and generally to exercise all rights, and enjoy all privileges, and obtain all benefits conferred by the laws of the said State of Oregon, or of any other state or territory in which this corporation may now or hereafter be engaged in the business aforesaid, or any branch or part thereof, upon corporations organized for the purposes aforesaid, or any thereof, particularly for the purpose of manufacturing and supplying electric power, and using, in connection therewith, the waters of the said Deschutes River, or other rivers, streams or lakes, in the development, rental, sale, distribution, or other disposition of electric power, for any of the purposes aforesaid, or for mining or irrigation; and, in connection therewith, or with any of the purposes or any of the businesses, or any part thereof, hereinabove set forth, to acquire, in any manner whatsoever, use, hold, operate, incumber, rent, lease or otherwise dispose of, or enjoy all real or personal property requisite, necessary, or convenient in carrying out any of the above purposes; and generally to do all acts and things requisite, necessary, convenient or proper in carrying out any of the above objects.

To enjoy any, and carry on all and every kind of works, business, occupation or transaction whatsoever incident or appurtenant to or promotive of the above named objects and purposes or any thereof.

2. That defendant, the Deschutes Railroad Company is and was at all times after the 1st day of Feb-

ruary, 1906, a corporation duly organized and existing under the laws of the State of Oregon, and under the corporate powers specified in its Articles, said corporation is and was at all said times, authorized to acquire and construct a railroad and telegraph line from a point of connection with the constructed line of the Oregon Railroad & Navigation Company, now the Oregon-Washington Railroad & Navigation Company, at or near Deschutes Station, now Sherman Station, in Oregon, and thence by some eligible route to be selected by the Board of Directors of the Company, via the valley or canyon of the Deschutes River, to a point at or near Bend, in the State of Oregon, and has and had at all of said times, power to condemn land for its right of way and station grounds.

3. That pursuant to a resolution of its Board of Directors, duly adopted February 2d, 1906, said Deschutes Railroad Company did on the 9th day of February, 1906, file with the Secretary of the Interior, a copy of its Articles of Incorporation and due proofs of its organization under the same, for the purpose of acquiring the benefits of the Act of Congress approved March 3rd, 1875, entitled "An Act granting to railroad companies a right of way through the public lands of the United States."

4. That on November 5th, 1908, the Board of Directors of the Deschutes Railroad Company duly passed a resolution adopting as the definite location of the said company's railroad, a survey of the route of said company's proposed railroad, as shown by the map presented at the meeting and covering the section of right of way

from Mile Post No. 38½ to Mile Post No. 63½, including the portion of said right of way in controversy in this case and lands north and south thereof, and adopted the center line as delineated on said map as the center line of the location of said company's railroad along said route and between the points mentioned and designated upon said map, and authorized the proper officers of the company to execute and file with the proper departments and officers of the government, the necessary papers to obtain the benefits of said Act of Congress approved March 3rd, 1875, and to acquire a right of way along the route as designated on said map. Said map so adopted is identified as Defendant's Exhigit No. 1, filed in this case November 17th, 1913.

5. That pursuant to said resolution, the said Deschutes Railroad Company did on November 8th, 1908, file with the Register of the United States Land Office at The Dalles, Oregon, in the district where said land is located, a profile of its route as adopted at said meeting of November 5th, 1908, by the Board of Directors of said company, which said profile is identified as Defendant's Exhibit No. 44, filed in this case, and the line of railroad shown thereon is identical with the line delineated on Defendant's Exhibit No. 1, above referred to; that thereafter such proceedings were had and taken in said matter that said profile or map was approved by the Secretary of the Interior on the 20th day of June, 1910.

6. That the said line of definite location of defendant's railroad was adopted as delineated on said map

and passes through the following described lands among others, to-wit: The North half and the North half of the Southwest quarter of section thirty-five; the Southeast quarter of section thirty-four; Tp. 3 S. R. 14 East of Willamette Meridian; Lots One and Two and the Southwest quarter of the Northeast quarter, the West half of the Southeast quarter, and the East half of the Southwest quarter of section three; the Northwest quarter and the Northwest quarter of the Southwest quarter of section ten; the Northeast quarter of the Southeast quarter, the South half of the Southeast quarter and the South half of the Southwest quarter of section nine; the Southeast quarter of the Southeast quarter of section eight; the Northeast quarter and the North half of the Southeast quarter of section seventeen; the West half of the Southwest quarter of section sixteen; the West half of the Northwest quarter of section twenty-one; East half of the Northeast quarter and the Southeast quarter of section twenty; the West half of the Northeast quarter and the West half of the Southeast quarter of section twenty-nine, all in Tp. 4 S. R. 14 East of Willamette Meridian.

7. That at the time of the filing of the map of definite location of defendant, on the 8th day of November, 1908, and at the time of the filing of the profile of said map of definite location on the 20th day of June, 1910, the South half of the Southeast quarter and the Southwest quarter of the Southwest quarter of section nine, the Southeast quarter of the Southeast quarter of section eight, the Northeast quarter and the Northeast quarter of the Southeast quarter of section seventeen,

the Southeast quarter of the Northeast quarter and the West half of the Southeast quarter of section twenty, and the West half of the Northeast quarter, and the West half of the Southeast quarter of section twenty-nine, all in Tp. 4 S. R. 14 East of Willamette Meridian, were vacant public lands of the United States on which no entry or settlement of any kind was subsisting or pending.

8. That on the 27th day of January, 1906, the North half of the Southwest quarter of section thirty-five, Tp. 3 S. R. 14 East, W. M., and lot two and the Southeast quarter of the Northwest quarter of section three, Tp. 4 S. R. 14, E. W. M., were vacant public lands of the United States; that on said date, A. L. Veazie, on behalf of the Interior Development Company, filed in the United States Land Office at The Dalles, Oregon, an application to select the said lands under the act of Congress of June 4, 1897, as Forest Reserve Lieu Lands with base in the name of the Santa Fe Pacific Railroad Company, and the said application was received and entered of record on said date and remained pending until it was dismissed as hereinafter stated.

9. That on the 13th day of February, 1906, Joseph H. Sherar filed a contest and protest against said application of A. L. Veazie, on the ground that the selected lands were not at the time of the latter's attempted selection thereof, vacant or unoccupied, but were in the possession and occupancy of said Joseph H. Sherar, and at the same time, to-wit, on the 13th day of February, 1906, said Joseph H. Sherar presented and there

were filed by him in the said United States Land Office and received and entered of record, applications on behalf of the said Joseph H. Sherar, to select the same lands as Forest Reserve Lieu Lands under said Act of Congress of June 4, 1897, likewise with base in the name of the Santa Fe Pacific Railroad Company; that the said applications of Joseph H. Sherar were never dismissed or withdrawn and patents thereafter issued to the said Joseph H. Sherar on the dates hereinafter shown.

10. That thereafter said contest between the said two applications was heard and decided against the said Joseph H. Sherar, and thereafter a rehearing was applied for by the said Joseph H. Sherar and the said decision against said Joseph H. Sherar was canceled and reversed, and on June 16, 1909, said Joseph H. Sherar having died in the meantime, and his executors having been substituted in his stead, a decision was rendered by the First Assistant Secretary of the Interior, sustaining the said contest and protest, which decision is as set forth in plaintiff's exhibit No. 9. At the time of the introduction of said exhibit, same was objected to on the ground that the same was immaterial and irrevelant, and not binding on the defendant and not substantive evidence of the facts in said case. Defendant hereby reserves the right on appeal to present the question raised by said objection.

On December 18, 1909, said application of A. L. Veazie was canceled and rejected by order of the Commissioner of the General Land Office. On February 25th, 1913, said selections of Joseph H. Sherar were

approved and ordered passed to patent and on the said 25th day of February, 1913, patents were duly issued thereon in the name of the Santa Fe Pacific Railroad for the use and benefit of the heirs and devisees of said Joseph H. Sherar, who held power of attorney from said Santa Fe Pacific Railroad Company to convey the said selected lands.

11. That appended to said patents when issued, was a foot note as follows: "The lands above described are subject to all rights under an application by the Oregon Trunk Line Inc., approved June 21, 1909, and an application by the Deschutes Railroad Company, No. 01603, The Dalles, approved June 20, 1910, under the Act of March 3, 1875, being applications for rights of way."

12. That on April 26, 1906, by letter of the Commissioner of the General Land Office, it was ordered that all lands in township three, south of range fourteen east, of Willamette Meridian, excepting any tracts title to which had passed out of the United States, should be temporarily withdrawn from any form of disposition whatever. Said action was taken by direction of the Secretary of the Interior, based upon a recommendation of the Director of the United States Geological Survey that said lands should be withdrawn for irrigation works under the Act of June 17, 1902, 32 Stats. 388, and on October 24, 1908, a similar order was made respecting said lands in section three, township four south, range fourteen east of Willamette Meridian, included in the Joseph H. Sherar selection above mentioned.

13. That on December 30, 1909, and March 18, 1910, the lands embraced in said lieu selections of Joseph H. Sherar were included in the temporary power side withdrawals Nos. 66 and 125, by Executive Order of the President of the United States, stating that the same were "in aid of proposed legislation affecting the disposal of water power sites on the public domain" which said executive orders temporarily withdrew all public lands embraced in said territory from all form of entry, selection disposal, settlement or location and temporarily suspended any existing claims, filings and entries thereon. That on July 2, 1910, an executive order was made, ratifying, confirming and continuing in full force said withdrawals under and subject to the provisions, limitations, exceptions and conditions of the Act of Congress approved June 25, 1910, (36 Stats. 847) which withdrawals remained in effect until February 25, 1913, when the same were canceled as to the lands included in said selections of Joseph H. Sherar, in order to allow patents to issue on said lieu selections.

14. That said power site withdrawal No. 66 confirmed as above stated by executive order of July 2, 1910, also included all the following described lands in township four south, range fourteen east, Willamette Meridian; the Southeast quarter of the Southeast quarter of section eight; the South half of the Southeast quarter and the Southwest quarter of the Southwest quarter of section nine; the East half of the Northeast quarter and the Northeast quarter of the Southeast quarter of section seventeen; the Southeast quarter of the Northeast quarter and the West half of the South-

east quarter of section twenty; the West half of the Northeast quarter and the West half of the Southeast quarter of section twenty-nine; the Northwest quarter of the Northeast quarter and the Southeast quarter of the Northeast quarter of section thirty-two; the Southwest quarter of the Northwest quarter and the West half of the Southwest quarter of section thirty-three.

15. That defendant has acquired at the date hereinafter specified, for each several tract, by deed from the owners thereof the following described lands, to-wit: October 6, 1909, a strip of land 100 feet in width, being 50 feet in width on each side of and parallel with the center line of the main track of the Deschutes Railroad Company's railroad, as same is staked out and located over and across the lands of H. F. Woodcock and Margaret Woodcock and A. M. Young and Flora Young, situate in Wasco County, Oregon and known and described as follows: The Northwest quarter of the Southeast quarter and the Southeast quarter of the Southeast quarter of section seventeen; and the Northeast quarter of the Northeast quarter of section twenty, all in township four south, range fourteen east of, Willamette Meridian, laying east of the Deschutes River.

October 27, 1909, a strip of land 100 feet in width, being 50 feet in width on each side of and parallel with the center line of the main track of the Deschutes Railroad Company's railroad, as same is staked out and located over and across the lands of G. W. Vanderpool and Lillie Vanderpool, situate in Wasco County, Oregon, and known and described as follows, to-wit: The Southwest quarter of the Northeast quarter of section

thirty-two, township four south, range fourteen east, of Willamette Meridian.

September 13, 1909, a strip of land 100 feet in width, being 50 feet in width on each side of and parallel with the center line of the main track of the Deschutes Railroad Company's railroad, as same is staked out and located over and across the lands of T. A. Connolly and Kathleen Connolly, situated in Wasco County, Oregon, and known and described as follows, to-wit: The Southeast quarter of the Southwest quarter of section nine; the West half of the Southwest quarter of section sixteen; the West half of the Northwest quarter of section twenty-one; the Northeast quarter of the Southeast quarter of section twenty, all in township four south, range fourteen east, of Willamette Meridian.

July 30, 1909, a strip of land 100 feet in width, being 50 feet in width on each side of and parallel with the center line of the main track of the Deschutes Railroad Company's railroad as same is staked out and located over and across the lands of Arabelle Staats and W. H. Staats, in Wasco County, Oregon, known and described as follows, to-wit: The Southeast quarter of the Southeast quarter of section thirty-two, township four south, range fourteen east, of Willamette Meridian.

December 23, 1913, a strip of land 100 feet in width, being 50 feet in width on each side of and parallel with the center line of the main track of the Deschutes Railroad Company's railroad as same is staked out and located over and across the lands of P. H. Connolly,

situated in Wasco County, Oregon, known and described as follows, to-wit: The Southeast quarter of the Southwest quarter of section nine; the Northeast quarter of the Southeast quarter of section twenty; the Southwest quarter of the Northwest quarter of section twenty-one, all in township four south, range fourteen east, of Willamette Meridian.

16. That by deeds from the heirs and devisees of Joseph H. Sherar, being the same deeds mentioned in escrow, plaintiff's exhibit No. 30, there were conveyed to the plaintiff, subject to the reserved question hereinafter set forth, prior to the beginning of this suit, all the following described lands in Wasco County, Oregon, to-wit: The West half of the Southwest quarter of section twenty-seven; the Southeast quarter and the Northwest quarter of the Northeast quarter of section thirty-four, township three south, range fourteen east; lot two, being the Northwest quarter of the Northeast quarter and the Southwest quarter of the Northeast quarter, and the West half of the Southeast quarter, and the East half of the Southwest quarter, and the Southeast quarter of the Northwest quarter of section three; the Northwest quarter and the Northwest quarter of the Southwest quarter of section ten, township four south, range fourteen east, Willamette Meridian; also the following described real property situate and lying in Sherman County, Oregon, to-wit: The North half of the Southwest quarter of section thirty-five, township three south, range fourteen east, of Willamette Meridian; also, the right to use so much of the banks of the Deschutes River where the same crosses or touches

the Northwest quarter of the Southeast quarter of section thirty-five, township three south, range fourteen east, of Willamette Meridian, as may be necessary or convenient in the development of power on the Deschutes River, above or below said last described forty acre tract; and also, a right of way across said last described forty acre tract for pipe lines, canals or flumes on such line thereon as may be hereafter selected, and that the conveyances from the said heirs and devisees of said Joseph H. Sherar contained the following covenant, to-wit: "We, the above named grantors, do hereby covenant to and with the said grantee and its successors, heirs and assigns, that we are the owners in fee of all of said premises save and except said Lot 2 and the Southeast quarter of the Northwest quarter of section 3, township 4 south, range 14 east, W. M., and the North half of the Southwest quarter of section thirty-five, township 3 south, range 14 east, W. M., and except as to said lands last mentioned have the lawful right to convey the same and that we will and our heirs, executors and administrators shall forever warrant and defend the same, and the peaceable possession thereof against the lawful claims of all persons whomsoever, except that as to said Lot 2, and the Southeast quarter of the Northwest quarter of section 3, township 3 south, range 14 east, W. M., and the North half of the Southwest quarter of section 35, township 3 south, range 14 east, and as to said last described lands we will and our heirs, executors and administrators shall forever warrant and defend the same against the lawful claims of all persons whomsoever, except the claims of any and all persons based upon or derived from the selection

of said lands by the Santa Fe Pacific Railway Company by A. L. Veazie, attorney in fact, and except all claims of the United States or persons deriving title from the United States subsequently to the date hereof."

Said deeds were recorded in Wasco County, Oregon, April 1, 1910, and in Sherman County, Oregon, April 9, 1910.

That at the time of the trial the attorneys for the respective parties stipulated as to the execution and delivery of the deeds from the heirs and devisees of Joseph H. Sherar to the complainant and at the time of said stipulation the following proceedings took place:

Mr. Veazie: May it please the court, in regard to the conveyance by which the Eastern Oregon Land Company received title to the lands in question here, from the heirs and devisees of Joseph H. Sherar, deceased, the original powers of attorneys and the deeds themselves are produced here but counsel for the defendant has stipulated with me that we may state into the record, for the purpose of saving the encumbering of the record by the offering of all these instruments, the purport of them. We stipulate the same thing as to all the remainder of these deeds, that is, that the reporter may enter them.

Mr. Wilson: From the heirs and devisees of Joseph H. Sherar to the Eastern Oregon Land Company. In explanation of this stipulation, I want to state that I admit that the heirs and devisees signed and executed the instruments purporting to be deeds containing the grant-

ing words and covenants as contained herein, but I desire to object to the sufficiency of the deeds or instruments to transfer to the Eastern Oregon Land Company any interest whatever in Lot 2 of Section 3, Township 4 South, Range Fourteen East, or the North half of the Southwest quarter of Section 35, Township 3 South, Range 14 East, on the ground and for the reason that the title to these tracts of land was still in the United States; no lieu land selection or other title had ever passed therefrom, and no approval of any selection on these tracts of land was ever made by the Secretary of the Interior or the Commissioner of the General Land Office, or any other officer in authority until the year 1913, or long subsequent to the execution of these deeds.

Mr. Veazie: May it please the Court, I understood it is stipulated and understood that the stipulation were have made is to cover the deeds from all the heirs of Sherar conveying these lands, and that the record may be completed hereafter by the addition of the others to save the time of the Court.

Mr. Wilson: That is correct, but I want to reserve any question on the sufficiency of these deeds to transfer any interest in these two pieces of land.

The Court: These two particular tracts you refer to.

Mr. Veazie: I understand the objection goes only to the point that you contend the title remains in the United States until the approval of the selections, and that your right of way deed conveyed title better than ours by our subsequent patents.

Mr. Wilson: In order that the Court may understand the point that I desire to reserve, it is this: That the title of the Railroad Company to this right of way over these lands is valid, and subsisting, and was acquired prior to any act on the part of the United States which would impair that title.

Mr. Veazie: That is the extent of the objection. You are not questioning that the title afterwards passed by the patents that issued. The only question you are raising is that it was subsequent to your filing of application for right of way, and the approving of that.

Mr. Wilson: We say our right is prior to any other interest in that land.

17. IT IS HEREBY STIPULATED that the defendant reserves the right to present the question as to whether or not said deeds passed any title from the heirs and devisees of Joseph H. Sherar to the complainant as far as relates to a strip of land 100 feet in width on each side of the center line of defendant over and across the said lot 2 of section 3, township 4 south, Range 14 East of Willamette Meridian, and the North half of the Southwest quarter of section 35, township 3 south, range 14 east of the Willamette Meridian.

18. That by deed of the Wasco Warehouse Milling Company, made the 18th day of March, 1910, were conveyed to the plaintiff, the following described lands situated in Wasco County, Oregon, to-wit: The Northeast quarter of the Southeast quarter and the Northwest quarter of the Southeast quarter of section eight; the

North half of the Southwest quarter and the Northwest quarter of the Southeast quarter of section nine, all in township four south, range fourteen east of the Willamette Meridian.

19. That by deed dated August 2, 1910, the Interior Development Company conveyed to the complainant the Northeast quarter of the Southeast quarter of Section nine, township four south, range fourteen east, and by deed dated April 4, 1914, said Interior Development Company conveyed to the plaintiff lot one, being the Northeast quarter of the Northeast quarter of section three, township four south, range fourteen east, Willamette Meridian.

Defendant reserves, however, the right to present to the court the question of the rights claimed by it as disclosed by this stipulation and the record in this cause, over the properties in this paragraph described, prior to the conveyance thereof to the complainnt and while the title thereto was in the Interior Development Company.

IT IS FURTHER STIPULATED that the Southeast quarter of section thirty-four, township three south, range fourteen east of Willamette Meridian, was patented to Joseph H. Sherar on April 24, 1882, under a homestead entry by the said Joseph H. Sherar. And that all of the lands described in the Hostetler option, plaintiff's exhibit 24, were owned by said J. H. Sherar on the date said option was given, excepting the North half of the Southwest quarter of section 35, Township three South, Range fourteen East; Lot Two and the

Southeast quarter of the Northwest quarter of section three, Township Four South, Range fourteen East of Willamette Meridian.

20. That this stipulation, together with the narrative form statement of the testimony to which it is attached, and the exhibit of which copies are included therein are attached thereto, to be printed therewith, to-wit: Plaintiff's Exhibits 1, 9, 19, 24, 25, 29, 30, 40, 42 and defendant's exhibits B, Q, E-2 and F-2, which it is stipulated are the only ones that need to be printed in the record; and the following additional exhibits referred to in said transcript of testimony which it is stipulated need not be printed, but shall be identified and the originals thereof set up with the record, shall constitute all the evidence in the cause for the purpose of the appeal herein, now pending; and said original exhibits, or in cases where copies were substituted, the copies thereof, to be set up with the record but not to be printed under the stipulation of the parties, being the following, to wit: Plaintiff's Exhibits 2, 3, 4, 5, 20, 21, 22, 23, 31, 32, 33, 34, 38, 39, 41, Whistler's Exhibits 1, 2, and 3, and defendant's exhibits A, C, Ca, R, S, T, U, V, W, X, Y, Z, A-2, B-2, C-2, G-2, 1, 8 to 34, 42 and 43 and 44.

Dated at Portland, Oregon, this 18th day of March, 1916.

VEAZIE, McCOURT & VEAZIE,
Solicitors for Plaintiff.

JAMES G. WILSON,
of Solicitors for Defendant.

(Testimony of B. S. Huntington)

B. S. HUNTINGTON, called and sworn on behalf of plaintiff, testified:

I am an attorney of the state of Oregon and have practiced here about thirty years. I was attorney, in his life time, for Joseph H. Sherar of Wasco County, Oregon. After the death of Mr. Sherar I was connected with the settlement of his estate. The only negotiations with anyone representing the Deschutes Railroad Company I have ever had to my knowledge respecting any right of way over the lands involved in the controversy here, as far as I remember now, were a telephone conversation between myself and Mr. Morrow, right-of-way agent of the Deschutes Railroad Company, followed by a letter on the same day, August 25, 1909. I think there were some negotiations or conferences between Mr. Morrow and Mr. Grimes but I have no personal knowledge of them. It is possible I was present at a conversation between Mr. Morrow and Mr. Grimes in my office. After Mr. Sherar's death and pending the controversy in the land office, negotiations were taken up with the attorneys for the Sherar estate by the Eastern Oregon Land Company, looking to the acquisition of the Sherar lands under the Hostetler option. I think this was in 1908. I would not be sure. It was some time prior to the writing of the letter just mentioned which is the letter now shown to me, dated August 25th, 1909, purporting to be written by Huntington and Wilson to J. W. Morrow, care of the O. R. & N. Company, Portland, Oregon. I wrote and signed it at the date it bears, and it was mailed in the usual course of business.

(Testimony of B. S. Huntington)

Letter received without objection and marked Plaintiff's Exhibit 29; withdrawn by permission and a copy substituted.

The conversation which led to the writing of that letter, as well as I can remember, was that Mr. Morrow called me to the phone and said that their contractors were very anxious to proceed with the construction work across the Sherar land and wanted to know if I, representing the heirs, would consent to their proceeding. I told him that we were not in position to give our consent; that we had contracted the land to the Eastern Oregon Land Company; that insofar as the heirs themselves were concerned, if the Eastern Oregon Land Company didn't take the land under the option, I thought the heirs would give their consent. Something was said about the price, and I think the price had been talked over before between Mr. Morrow and Mr. Grimes. Anyway, I had been advised that the price for the right of way, if the Eastern Oregon Land Company didn't take the land under the option, would be $1000, the company to so construct its road as not to interfere with the development of the water power at that point, and so as not to interfer with the toll roads which were owned by the heirs at that time; there were two toll roads which they crossed. But I told him that he would have to obtain the assent of the Eastern Oregon Land Company, and thereupon wrote him this letter in confirmation of the telephone conversation, which is as follows:

(Testimony of B. S. Huntington)

PLAINTIFF'S EX. 29.

"August 25th, 1909.

Mr. J. W. Morrow, c/o O. R. & N. Co., Portland, Oregon.

Dear Sir:

Confirming our telephone conversation of this afternoon the executors of the will of J. H. Sherar, deceased, and who also are attorneys in fact for several of the heirs are willing that the Deschutes Railroad Company shall proceed with the construction of its road across the Sherar lands in the Deschutes Canyon, provided the road is constructed sufficiently above the river *as* that it will not interfere with the use of the property for hydraulic purposes, and the persons who have agreed to purchase the property consent. The executors understand that if the persons who have agreed to purchase do not take the property that your company will pay One thousand dollars for the right of way. If the sale is consummated, as we assume it will be, then you are to settle with the purchasers for the right of way. Yours very truly, Huntington & Wilson."

My recollection is that it was at least several months prior to that that the Eastern Oregon Land Company had come into view as a purchaser under the outstanding option. I had nothing to do with the papers which had been executed between the parties before that time. I had no other negotiation with Mr. Morrow nor any other representative of the Deschutes Railroad Company

(Testimony of B. S. Huntington)

concerning this right of way, that I recall. There might have been a conversation between Mr. Morrow and Mr. Grimes in my office prior to this time, but I am not clear about that. I wrote the letter dated December 4, 1909, addressed to the Security Savings & Trust Company, Portland, Oregon, now shown to me. The deeds therein mentioned were deposited in escrow with that letter.

Said letter was received in evidence without objection, was marked Plaintiff's Exhibit 30, and is as follows:

"Portland, Oregon, Dec. 4, 1909.

Security Savings & Trust Co.,

Portland, Oregon.

Gentlemen:

Herewith we hand you the following instruments in writing:

Deed, Heirs of Joseph H. Shearar to Eastern Oregon Land Company, dated October 11, 1909.

Deed, Mary B. Sherar to Eastern Oregon Land Company, dated August 21, 1909.

Deed, Mary J. Hunt and others to Eastern Oregon Land Company, dated October 22, 1909.

Deed, Santa Barbara Water Company to Eastern Oregon Land Company, dated October 25, 1909.

Guardian's deed, Chris Johnson to Eastern Oregon Land Company, dated October 21, 1909.

(Testimony of B. S. Huntington)

Deed, Aztec Land & Cattle Co. to Eastern Oregon Land Company, dated October 25, 1909.

Deed, John H. Sherar and others to Eastern Oregon Land Company, dated November 24, 1909.

Deed, Santa Barbara Water Company to Eastern Oregon Land Company, dated December 1, 1909.

Deed, Aztec Land & Cattle Co. to Eastern Oregon Land Company, dated December 1, 1909.

These instruments are to be received and held by you in escrow to be delivered by you to the Eastern Oregon Land Company, or order, upon the deposit by said Eastern Oregon Land Company, to the credit of the undersigned attorney for the heirs of Joseph H. Sherar, deceased, of $45,000.00 cash.

Upon acceptance of the deeds by said Eastern Oregon Land Company, or its agent, you are to pay over to said attorney for the heirs of Joseph H. Sherar said sum of money.

Yours very truly,

B. S. Huntington,

Attorney for heirs of Joseph H. Sherar, deceased."

The deeds mentioned are the deeds of the Sherar heirs to the Eastern Oregon Land Company, by which the title was afterwards conveyed. The sale of the balance of the lands on the Deschutes River at Sherar's Bridge was consummated under the escrow arrangement outlined in that letter. There was considerable delay in closing because of a guardianship sale of the in-

(Testimony of B. S. Huntington)

terest of one minor heir. A part of the purchase price was paid before the final consummation and a certain amount was held back to insure the final conveyance of this minor's interest, and that was finally paid and the matter entirely closed. Prior to the deposit of the deeds with the bank, the Eastern Oregon Land Company, or the holders of the option at any rate, had given notice that they had elected to purchase and were ready to close when the titles were made satisfactory. The Eastern Oregon Land Company was the purchaser I had in mind to whom I expected to sell at the time I wrote the letter of August 25, 1909. I am very certain that I told Mr. Morrow in my conversation with him about the procuring of the right of way, who the intending purchaser was, and I think he said something to indicate that he knew Mr. Walter Martin of the Eastern Oregon Land Company was interested in the matter.

On cross examination the witness testified:

I have for a long time past been attorney representing the Eastern Oregon Land Company in some of its business. I did not represent them in this transaction at all. I was representing the Sherar heirs. I have represented the company in certain matters for a good many years. Before I had anything to do with it, the Eastern Oregon Land Company had acquired a large amount of property in Wasco and Sherman counties and other counties in the state, but so far as I know they had not acquired any other property in Wasco County subsequent to the requirement of The Dalles Military Road

(Testimony of B. S. Huntington)

Company, up to the time they acquired the Sherar property. They had a controversy with Mr. Moody over property on the Deschutes, further down the river, in which I represented them. I was associated with other counsel. It is possible there was a conference between myself and Mr. Grimes and Mr. Morrow in my office at The Dalles a few days prior to the writing of this letter of August 25th, 1909, in regard to acquiring of right of way by the Deschutes Railroad Company over the Sherar property. There were a good many talks back and forth between myself and the executors and the right of way agent for the Oregon Trunk at that time. I am not clear whether Mr. Morrow was there at one time or not, but it is quite possible that he was. It is quite probable, if we did have that conversation, that we agreed that if the land was not sold, we would do whatever we could to expedite the solution of the question. The Sherar heirs were anxious for the construction of a railroad at that point. They owned a large body of land on both sides of the river and they thought the building of the road would enhance the value of their other lands. My authority for fixing the consideration named in this letter was that Mr. Grimes and myself had talked it over and I was under the impression that it had been talked over by Mr. Grimes and Mr. Morrow prior to that time, and it may be that in the conversation you refer to, if such took place, it might have been mentioned. I knew the railroad company was anxious to go ahead, but I also knew they knew we had given the option to the Eastern Oregon Land Company, or at least, that the company

(Testimony of B. S. Huntington)

held it. The Deschutes Railroad Company was asking us to give them our consent to go upon the land in the event the Eastern Oregon Land Company should not take it; there is no question about that. Mr. Grimes, representing all the heirs at that time in these negotiations, I think was anxious that if the Eastern Oregon Land Company did not buy the land, the road should be built. Their main ranch was just on the hill to the east, a tract of land that had theretofore been used for stock purposes and much of which was valuable for wheat raising. They talked about the value being increased to their other lands by the building of roads up the river, and the size of the consideration mentioned was due largely to the fact that they wanted the road built, because they thought it would enhance the value of their other lands. In any event, this letter was written by authority, and in case the Eastern Oregon Land Company had not taken the land, I have no doubt the understanding outlined therein would have been fulfilled. In the telephone conversation Mr. Morrow stated that he had seen Mr. Martin on the railroad train, as I remember it, and had talked with him about the railroad company going upon the land. I don't think he told me that Mr. Martin had advised him that in case the purchase went through, the same understanding he had with us would be carried out with the Eastern Oregon Land Company. He said he had seen Mr. Martin and, as I remember it, he said he was satisfied that he could fix it with Mr. Martin, or something to that effect. I don't think I got the impression from Mr. Morrow that the Eastern Oregon Land Company had agreed to

(Testimony of B. S. Huntington)

let him go on the land and construct the railroad. I thought I got the impression that they had had a conversation which was entirely friendly, and that he thought they would have no difficulty in adjusting the matter with the Eastern Oregon Land Company. That is my recollection of it. I did not make any effort then to see that Mr. Morrow had complied with the condition that they should get the consent of the intending purchaser as that was none of my business. I knew that the railroad company was at work in the canyon. The papers were full of it and it was well known in the community. The work in the canyon was commenced shortly before the writing of this letter. I can't say as to the work around Sherar bridge and in the vicinity of this particular property in controversy in this suit. I was not out there and I don't remember how far the work had progressed in the canyon at that time. I do not recall having advised the Eastern Oregon Land Company or Mr. B. F. Laughlin, or any of those persons claiming an interest in this land that I had given such consent to the Deschutes Railroad Company. It is possible I did, but I wouldn't say I did or didn't. I have not looked at my letter book with that in view. I do not think I saw any representative of the Eastern Oregon Land Company about that time. However, there was nothing said in regard to any understanding about toll roads in this letter of August 25th, 1909. I think they were mentioned in the telephone conversation. They were to leave the toll roads in just as good condition as they found them, or if they disturbed them, they were to build

(Testimony of B. S. Huntington)

practically as good a road. I do not think the notice of election of the Eastern Oregon Land Company to purchase the property was in writing. It was after the writing of that letter that Mr. McKenzie notified me that the Eastern Oregon Land Company was going to take the property under the option. The Sherar heirs had never adopted any plans for the development of the river at that point. Mr. Sherar had talked about it and I think had some surveys made, and had filed some water notices. He did some development work that was not of a permanent character and did some work pursuant to his notice. I do not know what kind of development he had in mind.

In regard to the conversation between myself, Mr. Morrow, and Mr. Grimes in my office, if Mr. Grimes and Mr. Morrow say that such a conference took place, I would not deny it. I remember something about some conference there with the right of way agents. I think we had several with the Oregon Trunk people and it is quite possible that such a conference took place in my office. If such conference took place, that and the telephone conversation were the only negotiations that I remember of with the Deschutes Railroad Company with reference to securing right of way.

RE-DIRECT EXAMINATION.

The lands of the Sherar estate I referred to when I said that the estate owned other lands, the value of which was supposed to be enhanced by the building of the rail-

(Testimony of Walter S. Martin)

road, are the lands known as the Finnegan ranch, consisting of between two and three thousand acres, the nearest point of which to the railroad would be perhaps four miles; upon the hill in Sherman County. They also owned some land in Tygh Valley on the other side of the river. I think a section and a half or perhaps two sections. It was not considered that the building of the railroad would enhance the value of the Sherar lands in the canyon, which were under the Hostetler option. Mr. Linthicum of the firm of Williams, Wood & Linthicum, represented the Eastern Oregon Land Company after I did in this transaction with reference to the purchase of lands in the canyon covered by the Hostetler option.

RE-CROSS EXAMINATION.

A large part of the lands in the canyon was rocky land. There were some little grazing lands in connection. The rock is a basalt rock formation that is common to all of that country. They have no market value from a standpoint of rock.

WALTER S. MARTIN, called and sworn on behalf of plaintiff, testified:

I reside in San Francisco. I was president of the Eastern Oregon Land Company at the time of the purchase of the lands in controversy here. The project of acquiring them for power purposes was first considered, I think, in 1908. About the first of August, 1909, we decided to take over the Hostetler option which Mr.

(Testimony of Walter S. Martin)

Laughlin presented to us in writing. I was in Portland when complainant's Exhibit 2, accompanying the deposition of Mr. Laughlin, was made. I do not remember definitely when it was signed by Mr. Laughlin or by the Eastern Oregon Land Company. I assume that it was signed shortly after it was written, probably about the end of that month. Mr. Wallace, who signed as secretary of the company, was not in Portland. I think he must have been in San Francisco. I assume it must have been executed before the first of December, but I have nothing to fix the date. I remember making the contract of August 6, 1909, with Mr. C. B. Simmons, which is marked Complainant's Exhibit 3, in connection with the deposition of Mr. Laughlin. It was made about the date it bears, at the same time of the agreement with Mr. Laughlin. I do not remember how the instruments came to be acknowledged in San Francisco the 4th of March, 1910. Those are the signatures of Mr. Wallace and myself on behalf of the company. I was at that time president of the Eastern Oregon Land Company and he was secretary. I think the first payment made on the taking over of the property by our company was in the first part of December. We came to terms about December 1, 1909, with the Interior Development Company for the acquisition of its rights there. I am not sure whether the agreement of the Interior Development Company was in writing or not. The first payments were made on the acquisition of the property, December 2, 1909, when $10,000 was paid the Interior Development Company. On the same date $10,000 was paid to B. F.

(Testimony of Walter S. Martin)

Laughlin. In February, 1910, $6500 was paid Laughlin and Simmons jointly. On March 1, 1910, $6500 was paid Laughlin and Simmons, and on March 24th, the Wasco Warehouse & Milling Company was paid $3200, and on the same date the Sherars were paid $40,000. The balance of $5000 was paid subsequently. You see, Balfour, Guthrie & Company are our general agents here in Oregon and they handle our business here locally. I would not be able to say of my own knowledge where those deeds were, whether in Mr. Huntington's hands, Balfour, Guthrie's hands, or where. I know about the first of December, or the early part of December, they were deposited in escrow with a trust company here, pending the completion of the payments, but where they were in the meantime, I do not know. I do not know that we ever received them any more than Balfour, Guthrie & Company received them.

The defendant railroad company never made any attempt prior to the bringing of this suit to agree with me or my company for the obtaining of a right of way over this land. No one on behalf of the railroad company ever undertook to negotiate with me for a right of way over the lands that I know of. We gave the Deschutes Railroad Company a right of way over the property at the mouth of the river. At the time we made this arrangement I think we had not acquired the option of any interest in the lands involved in this litigation. The conveyance of the right of way over the lands below appears to be dated December 24, 1909. I thought it was long prior to that. I am confident the negotiations were long

before that, but we agreed on what they were to do at the site lower down long before that time. I don't recall the definite date when the Deschutes Railroad Company began any construction work on the lands in controversy. As far as I know, the railroad construction was not under way by the two companies in August. I imagine the work had begun on the lower river at that time. I don't think I was aware in August of any railroad construction on the lands in question in this suit. I don't recall any facts about railroad construction at that time. They were building at a point from the Columbia River south, and I knew that there was material in Sherman County—that there were men up there. If you mean particularly the Sherar Bridge property, my impression is that I did not know in August that they were upon the land or that any construction had been begun there, but I knew the railroad was building in the Deschutes Canyon. There was a great deal of talk about it in the newspapers. Two railroads were building at that time up the Deschutes Canyon, the Oregon Trunk being located mainly on the west side of the river.

At the time we took up the purchase of these lands and acquired the option, we had already made some investigation as to the availability of the site as a power site, and we purchased them with a view to their hydroelectric possibilities. The features that render the lands particularly available for that purpose are that they are reasonably accessible to Portland by transmission lines, the distance being about 90 miles. The flow of the Deschutes River is remarkably uniform, the mean annual

(Testimony of Walter S. Martin)

rise and fall being very slight, and flood conditions are very favorable. The river at that point, between the falls and the rapids immediately below, within a reasonable distance, has a fall, I think, of about 34 feet. The project itself permitted of the construction of a dam, and by the use of either pipes, flume, or tunnel, for a comparatively short distance, by which the water would be transmitted, a head would be gained for the water. The water supply was perfectly safe, was of large volume, and the general character of the construction was economical and also safe. The bed of the river or so much of it as is visible and open to examination—the canyon and bed of the river appear to be basalt or lava flow. On the surface walls of the canyon there is a good deal of loose material, but when that is cleared away there appears to be a solid rock formation underneath. There are no loose materials on the river bottom as far as you can see.

During the year 1909 we employed engineers to make an examination respecting the power site and other features entering into the consideration of these lands for a hydraulic project. The first engineer we employed was a man by the name of Sykes, in 1908. Then we employed Mr. Whistler, and finally J. C. White & Company. Mr. Whistler's reports were received during the summer and fall of 1909. I think the first intimation about the location of the railroads came through inquiries that were made through the Sherar people, or through Laughlin. An inquiry was made as to what they should do in regard to a requested permission by the

railroad company for a right to go over these lands. That is where I first heard of any request of the railroad to go over the property. I think that either in the end of August or the first part of September, something was said about it. The Sherar heirs said that some inquiries had been made to them for a right of way over the lands, and I think I advised them that if they granted a right of way which impaired the value of the property for power purposes, we would feel free to cancel the contract of purchase which we had made, as the contract was made on the basis of its value for power. I don't think I directed them to demand any particular height of dam or anything else, but they would have to take the responsibility themselves for anything they agreed on if they expected us to take the property afterwards.

Q. When did you first learn that the location of the road on the ground was such as to interfere with the construction of a sixty-foot dam?

A. Well, this question of the construction of a sixty-foot dam is a thing I am not quite clear about. I understand that the railroad as now constructed is at 66 feet; that if the railroad company is satisfied with its own location, that all it has to fear is the flooding of its tracks in the flood season. It is physically impossible to build a dam 60 feet there but in case of flood the railroad right of way will be flooded. If that responsibility is up to them, why I don't know that I am concerned with it. If it isn't up to them, I am concerned.

We were asked by the court yesterday to produce a profile of the defendant's road, which defendant said

(Testimony of Walter S. Martin)

had been delivered to Mr. Whistler. I have here a profile which was in our office in San Francisco. I don't know how to identify it as being the one Mr. Whistler received, but this came from our office in San Francisco and was evidently furnished by the railroad company. I don't even know that it is the only one we have there.

Mr. Wilson: This is the profile which we furnished.

Same was received in evidence as plaintiff's exhibit 31 without objection.

After we received the reports from Mr. Whistler that he has testified about, concerning this power, we employed J. G. White & Company, a firm of consulting engineers with headquarters in New York, and offices, I believe, in various cities of the United States, including San Francisco. By general reputation they are as of high standing in their line as consulting and constructing engineers as there are in the United States. I made arrangements with them, I think, in the fall of 1909, but they did not get to work until early in January, 1910. I received a preliminary report on March 3rd or 4th, 1910, and their final and full report somewhat later. That report was filed in this court on the 12th of November, 1913, identified as complainant's exhibit I, in connection with the deposition of Mr. Thomas F. Richardson, who was the engineer responsible for it, I believe.

Q. What total amount did your company expend in the acquisition of these lands?

A. Up to this time?

Q. Yes.

(Testimony of Walter S. Martin)

MR. WILSON: I think that is immaterial.

THE COURT: Let him answer the question.

MR. VEAZIE: I think your Honor, the price paid for the land is always evidence affecting their value.

THE COURT I think probably it is competent here for this is not an action to condemn this property and it may be necessary to ascertain the damages ultimately and include it for that purpose. You may answer the question, Mr. Martin.

A. The total out of pocket cost and some that is due to be paid for this property amounts to something over $190,000, not including the expenses attached to this suit, whatever that may be.

The lands were acquired for their hydro-electric possibilities. One piece of forty acres had nothing to do with the hydro-electric development. There were some toll roads included in the purchase which we afterwards disposed of for $3500.00, and we sold the forty-acre piece above mentioned for $200.00, or a small sum. The remainder of the lands are held in connection with the power project. When we purchased the rights of the Interior Development Company, we also took over the stock of the company, and have held it all ever since. As the railroad is now located, it interferes with the power project on that site in the following ways: Under flood conditions, under the maximum flood that has been known, 30,000 second feet, and I imagine even less than that amount, the tracks of the Deschutes Railroad Com-

(Testimony of Walter S. Martin)

pany from the dam south as far as the flow line reservoir goes, would, I believe, be flooded practically, or it would get up to the top of the rail. The adoption of any one of the alternative schemes that have been proposed for development there have been largely curtailed by the construction of the Deschutes Railroad. It would not be possible, I believe, to use the canal plan, which was one of the projects, with the Deschutes Railroad in the location that it is in. The location of the tunnels, or the inlets and outlets of the tunnels for this plant, as it is proposed by the J. G. White plan, is absolutely limited by the location of the railroad. The outlets must come out below the tracks, it being dangerous and impracticable to bring them out above the tracks. Getting the material from the walls of the canyon for the construction of the dam, which it is figured is to be of reinforced concrete, and using the basalt material that is in the walls of the canyon, will be more difficult, dangerous, and expensive to get out. The putting in of the inlets and outlets of the tunnels will also be more dangerous and more expensive because of the location of the railroad there. There is a certain risk involved in the possibility of an accident from the railroad by a car or engine falling off the track and damaging the inlets and outlets of the tunnels. There is also a certain risk that the plant will at all times be suffering by reason of the railroad being in that location from the fact that men are employed around there, and that with or without the consent of the power company they will be brought in contact with the railroad and its operation, and it is probable that there will be accidents.

(Testimony of Walter S. Martin)

These are what I consider the disadvantages of the railroad being located at Sherar's Bridge from the power point of view, and also from the particular location that this railroad has with regard to the proposed plant.

The railroad company moved the old wagon road running from Sherar's Bridge to Grass Valley, from a point above, or on the bluff, which is the position the railroad itself occupies with its right of way now, and placed it below the bluff on a narrow ridge between the river and the bluff. The effect of that is that in the space picked out by the engineers for the location of the power house, which was small enough under all conditions and required building up to accommodate the size of power house they ultimately expected to put there, the location of this road has now curtailed that. Another disadvantage that comes from the road being located there is the fact that there will be a public highway passing immediately along a large plant similar to a manufacturing plant, where men are employed, and will be crossing the outlets of the tunnels, thereby subjecting them to a certain amount of risk and danger from the casual person that has a right to travel along the public road. From the point of view of power development, I consider it extremely disadvantageous. And the agreement or proposal of the railroad company, as I understood it from Mr. Whistler, was that they would locate their road above the track. The railroad company threw a great deal of rock down on the power site during its construction work—thousands of yards, I should think. It would

(Testimony of Walter S. Martin)

be necessary to remove that before any construction work could be done on that site.

Our first purpose in obtaining the engineering report of J. G. White & Company was to learn the most efficient development that could be put in there from all points of view. None of the plans suggested by Mr. Whistler or others who had previously examined the site, had been adopted by our company. J. G. White & Company, after they had made their examination, reported definitely the line of development as to which the property was adapted, which is the plan embraced in the exhibit, subject to modification. The Interior Development Company had furnished us some reports, among them that of Mr. Kelly. Also one from Mr. Thompson, one from Vealy, Blackwell & Cooper, and one from a man named Chambers.

Q. State whether or not those lands also had availability owing to their location for railroad construction purposes, at the time you bought them—whether any railroad that might seek a water grade from the Columbia River to the Interior of Oregon would be likely to need this land for that purpose.

Mr. Wilson: I object to that. They are claiming here that practically the sole injury in this case is the interference with their right to construct a power plant.

The Court: You can take the testimony and Mr. Wilson will save an exception.

A. Well, I understand that the Deschutes Canyon as a means of reaching the interior of Oregon from the

(Testimony of Walter S. Martin)

Columbia south is practically the only route that will present a water grade.

It is a narrow canyon, deep and rocky. The bottom of it is, I think, generally not more than the width of the river; has a little margin in some places on each side of the river. At this point any railroad constructed would have to cross our lands for a distance of approximately three and one-half miles. No deed of conveyance of any right of way or conveyance in any form has ever been executed by my company to the railroad company, nor any other form of grant of right of way, and the railroad company never had any permission from the Eastern Oregon Land Company to enter upon the lands at the time it did.

CROSS EXAMINATION.

I have been president of the Eastern Oregon Land Company for ten or more years. I was in Portland in the summer of 1909, but not frequently. I had been told early in the summer of 1909 that the Deschutes Railroad Company had determined to build up the canyon and was constructing its line. I was negotiating with some of the officers of the Deschutes Railroad Company concerning a right of way at a point lower down and it was in the summer that the thing was agreed upon. We executed deeds to the Deschutes Railroad Company for a right of way across our property on the lower river, and the instrument now handed me is such deed.

Offered in evidence and marked Defendant's Exhibit A, and accompanies this record.

(Testimony of Walter S. Martin)

No cash consideration was paid for that deed.

Q. You didn't consider then that there was much danger to your employees at this lower power site by reason of the operation of that line, did you?

A. Well, it is a different proposition down there.

Q. You didn't consider that the railroad constructed across there was going to damage your power site to any material extent, did you?

A. Well, now, at that site the project for the development of the power was entirely different from the one at the Sherar site; at that site the railroad company has agreed to move its roadway back so as not to interfere, as I remember it, with the forebay of the dam, and at that site there are no tunnels, and there is no long stretch for employees to be on the right of way; the power house was immediately below the dam—quite different projects.

They agreed to remove their roadway in approximately 25 feet. That right of way deed covers practically nine miles, but the objection at the Sherar site is between the inlet of the tunnels and the dam itself, and the power house, a distance of over a mile. The easiest means of going from the power house at Sherar's to the damsite where the gates or inlet of the tunnel will operate is over the right of way of the railroad company. We can't forbid that and there will be accidents. At the other site, there is a simple dam with forebay, and penstock comes right out of the dam, with the power house immediately at the foot of the dam; no distance for anyone to walk; no gates to operate; no risks. The charac-

ter of the land down at the lower site is a little better than at the Sherar site.

We first employed Mr. Whistler to make an examination of the project early in 1909. He went on the property early in the year and made a general report of the Deschutes River, and I think he went up again in the fall and made the report, which has been referred to, in October, 1909. I have no means of knowing whether or not exhibit 31 is the map referred to in Mr. Whistler's deposition as having been secured by him from Mr. Boschke, Chief Engineer of the Deschutes Railroad Company.

Q. In any event you secured information, or someone connected with your company did, that full information as to the location of the line could be secured by going to Mr. Boschke, and Mr. Whistler went in response to that information, did he not?

A. He was satisfied.

Q. You have no reason to doubt it?

A. I have no reason to doubt it.

After the conference and the furnishing of the data by the Chief Engineer of the railroad company, Mr. Whistler made his report, in the early part of October. I do not recollect whether Mr. Whistler sent the maps and profiles he secured from Mr. Boschke to San Francisco. In any event we found this profile, exhibit 31, in our office. Mr. Whistler's object in securing the information from Mr. Boschke was that when it was evi-

(Testimony of Walter S. Martin)

dent that the railroad company was going to continue its construction up there, and that it would pass through the Sherar property, we wanted to get an idea of what the railroad company's plan was, and find out, when we knew that plan, how it affected a possible power development at that site. Mr. Whistler was employed for that purpose and instructed as you saw.

Q. And you never made any objection to the company on account of the method in which they were constructing their line, on account of any information that was furnished you or otherwise?

A. I did.

Q. At what time?

A. I came up here as soon as I received the J. G. White report and I went to see Mr. Morrow, and I told him what was contained in this J. G. White report.

The preliminary J. G. White report was made on March 3rd, 1910.

Q. And that was five months after the line had been constructed across that property.

A. Well, I can't help that; you asked me when we objected. I objected as soon as I had information on which to base an objection.

Q. You never objected to any work of the Deschutes Railroad Company at that point by virtue of Mr. Whistler's employment, did you?

A. He states that the water level is not known to Mr. Boschke and that he can't form a definite estimate as to where the railroad is with regard to the water.

Q. That is generally correct.

(Testimony of Walter S. Martin)

A. I couldn't do any better.

Q. He also said Mr. Boschke furnished him with profile, showing the height of the line, did he not?

A. It doesn't show the water level.

Q. Doesn't show the water line but does show the height of the railroad grade, doesn't it?

A. I am not an engineer, but I suppose you have to know what the height above a given point is to know what the difference is.

Q. But Mr. Whistler could ascertain the datum from which that was taken, could he not?

A. He asked for it, and he said in his report Mr. Boschke didn't know.

Q. He said he didn't know the level of the water; isn't that correct?

A. That is the very controlling feature. That is exactly the whole essence of the thing. If he doesn't know the water level, what indication would it be as to the height the railroad was going?

The height of the railroad is not shown here because the water level is not shown.

Q. But then this profile, all these profiles are made from definite datum, aren't them—basing point?

A. At sea level, I assume.

Q. And isn't it an easy enough matter to ascertain the elevation which the water is above sea level?

A. If we ran out and took the elevation at that point. I don't suppose that was up to us, was it?

Q. Isn't that a part of Mr. Whistler's duty? Isn't

(Testimony of Walter S. Martin)

he doing it every day throughout this construction work of his?

A. Oh, I doubt that; he wasn't constructing the Deschutes Railroad. Right here, between the two engineering companies, the Oregon Trunk on one side and your own engineers on the other, there is a difference in datum. I have forgotten whether seven or eight, or twenty-seven or twenty-eight feet.

Q. In any event you never made any objection?

A. We were informed by Mr. Whistler that Mr. Boschke had given him a profile; he examined that; it didn't have water level on it, and he couldn't tell if the railroad at that point was 60 or 70 feet above mean low water, or what the elevation was.

I don't recollect whether Mr. Whistler stated he had been on the ground or not. He may have. I don't think he was. I think he examnied what Mr. Boschke gave him here.

Q. But in any event you never made any objection to the construction of this line until after you received the report of J. G. White & Company in March, 1910.

A. I didn't make any objection to the railroad construction until I had a basis for knowing what I was talking about.

I don't think the railroad company ever refused to give us any information they had about the construction of the line, or to our employees.

Q. In fact you received information from some point that whatever was done there was open to your employees, and you sent Mr. Whistler for that purpose?

(Testimony of Walter S. Martin)

A. Oh, I don't know that there was any general offer of that kind made; we owned the land; they wanted to get right of way over it; we had a power project in view, and we wanted to know what their probable plans were, to see how it would fit in with our project; that is all that consisted of.

Q. Now, do you remember a conversation on the Oregon Electric Line on the 24th day of August, 1909, between yourself and Mr. Morrow?

A. I do.

Q. What if anything was said at that time about this project?

A. Well, I had been down to Salem to see Mr. McCormack about purchasing the Interior Development Company's interest in this property. I met Mr. Morrow on the car by chance, and I don't know how the conversation began unless it was in connection with the Moody site, and I remember that Mr. Morrow said that he thought the Deschutes River was an exceptional opportunity for the development of power and that we had a valuable property there. That if he had gotten the opportunity for a five minute conversation with Mr. Harriman, he would have bought for the railroad company the Sherar site, which he thought was a valuable property. I told him I was very glad to hear he thought so well of it as we had just concluded the purchase of the property, and he congratulated me on it and said "I hope that we will have as agreeable a time fixing the right of way over the Sherar site as we had at the mouth of the

(Testimony of Walter S. Martin)

river." I said "I hope we will." The conversation languished as far as that was concerned.

Q. Didn't Mr. Morrow say to you at that time he had been to see the Sherar heirs and the Sherar representatives to purchase a right of way over there, and had agreed with them to pay them a thousand dollars in case you didn't take the property, and would be glad to pay you—

A. I don't recollect it.

Q. (continuing) and would be glad to pay you that sum of money if it would be satisfactory to you?

A. He never said that to me.

Q. No such conversation took place. And you had some controversy with Mr. Morrow about paying a commission to some agent here, did you not, on the lower damsite deed?

A. Oh, I did exact a payment for a man here, didn't I?

Q. You attempted to, but I believe it wasn't paid.

A. Yes they did, didn't they?

Mr. Morrow: It never was paid.

Q. Didn't Mr. Morrow say to you in connection with this deal that if you didn't want the consideration you could pay that to this man as his commission that you desired on the lower site? Do you recollect that?

A. No, I do not. I thought they paid that on the lower site, $500 or something or other.

Q. You don't recall any such conversation at all?

A. No, I do not. Now, I may have referred to that

commission in the conversation on the Oregon Electric car coming up from Salem.

Q. Was there any other conversation you had with Mr. Morrow or any agent?

A. I saw Mr. Moore in March when I had the J. G. White report; I went to him to tell him I had that report, and he and I, I think, went to see Mr. O'Brien, up in his office in the building.

Q. I mean prior to this time. You testify, Mr. Martin, that you at no time agreed to take a thousand dollars for this right of way over the Sherar property in case you acquired it?

A. Absolutely a thousand dollars was never mentioned to me in connection with this property; it would have been a joke.

Q. Now, why did you say to the Sherar heirs or representatives if they did anything to impair that property for power purposes that you would feel free to cancel the contract with them?

A. Because I was buying it for power purposes; if they destroyed its power value, it had no further interest for me.

Q. Where did you get any information that they were contemplating doing anything to impair the power value?

A. They informed me that they had been requested to give a right of way.

Q. When was this?

A. I think one request—or some of this information

(Testimony of Walter S. Martin)

came in October. Now, whether in relation to the Deschutes or the Oregon Trunk, I don't know.

Q. October, 1909?

A. Yes.

Q. And did you take up with Mr. Morrow or any one connected with the Deschutes Railroad Company the fact that you were contemplating the purchase, and you didn't want them to treat with the Sherars?

A. I had bought the thing in August.

Q. In August, 1909. You hadn't paid any money at that time?

A. No, but we were under an obligation.

Q. What date in August?

A. Well, one contract was on the 5th, and the other contract on the 6th.

. . . . . .

Q. You say they telephoned you that they were considering a right of way or the Deschutes people wanted a right of way?

A. No, I don't know that it was the Deschutes people.

Q. Well, that some one wanted a right of way?

A. One of the railroads had communicated with one of these representatives of this property, either the Sherar interests or Laughlin or Simmons; it was communicated to me, I think, in San Francisco—I am not sure if it was here. What I said in reply to the thing was that if they do anything in regard to the right of way which damages the power value of that property, they do so at their own peril, and if they damage that

property from the point of view of its power possibilities, we will feel free to retire from our contract.

Q. Now, Mr. Martin, the railroad was practically constructed there before you paid any money in December, 1909, was it not?

A. Oh, the railroad was doing all kinds of things there.

Q. I mean it had men on the work and the grade was practically completed at that time, across the Sherar property?

A. Well, I don't suppose that I was bound to assume that a perfectly illegal and violation proposition of that sort was binding on me.

Q. And you replied, if they interfered with the power proposition you would feel free to cancel it.

A. I don't believe it was a statement they had constructed and wanted permission; it was a request for permission to go upon the land. It didn't indicate that they had already built their road.

Q. To go upon the land?

A. To go upon the land.

Q. For what purpose?

A. For the purpose of building a railroad.

Q. Didn't you know before you paid any money the amount of construction that had taken place on that land?

A. No.

Q. You didn't care anything about that?

A. No. Oh, I don't say I didn't care. I didn't know.

(Testimony of Walter S. Martin)

Q. You didn't take any means to ascertain. You simply paid over your money irrespective of what had happened with reference to that desire of the Deschutes Railroad Company to construct their line over that land?

A. I ascertained that the people from whom we were buying the property had not in any way involved the property in any promises or agreements or deeds, or any act at all which involved the question of right of way. What remained to be settled if we bought was the question of whether the railroad had ever had any right to come on there at all, or not.

Q. Did they show you a copy of that letter of Mr. B. S. Huntington which was introduced in evidence?

A. They did.

Q. You had seen that at that time, had you?

A. I had.

Q. And did Mr. Huntington tell you that in response to that letter, Mr. Morrow advised him that he had seen Mr. Walter Martin, and Mr. Walter Martin had consented?

A. I never heard of that until today.

Q. But you had seen Mr. Huntington's letter?

A. I saw Mr. Huntington's letter.

Q. And he didn't show you the reply?

A. He did not show me the reply. . . .

That the furtherst land south which the Eastern Oregon Land Company owned is the northeast quarter of the southeast quarter of Section 9, Township 4 South, Range 14 East. The company has, however, rights further up on the Oregon Trunk side. They had no rights

(Testimony of Walter S. Martin)

on the Deschutes side of the river, unless the Oregon Trunk has, further south than the northeast quarter of the southeast quarter of said section 8.

Q. How high a dam, Mr. Martin, can be constructed at the dam site that is in controversy in this case, that won't flood the lands at that point?

A. Well, there are some features there that have got to be understood before you can make a statement about that.

I do not know the fall of the river from the northeast quarter of the southeast quarter of section 9, township 4 south, range 14 east, down to the dam site. I have not made any investigation at that point. We have not as yet secured all the rights necessary to build a dam 60 feet high at the dam site. I do not know what land the railroad company owns there, but there are lands in private ownership that would be under the flow line of the reservoir with a dam 60 feet high that the Eastern Oregon Land Company does not own. The Eastern Oregon Land Company would have to acquire such rights before it could construct a dam, and it hasn't such rights today.

The only part of the $190,000 which the Eastern Oregon Land Company will be out of pocket by virtue of this power site, which is not paid is one item of $27,000 due to B. F. Laughlin and his associates, and a small bill to J. G. White & Company for services in getting these depositions. The balance of money expended covers the purchase price from the Sherar heirs and the purchase

(Testimony of Walter S. Martin)

price from the Interior Development Company. $20,000 was paid the Interior Development Company. Mr. Welch still has an interest in the project. The Sherars were paid $45,000. Laughlin and Simmons were paid $23,000. Their interest was that of holders of the option, and this amount was paid for their interest in the option. They are to get $27,000 more in bonds. The Wasco Warehouse & Milling Company was paid $3400 for their piece of property in sections 8 and 9; a string of forties up the White River. The up-keep of the water filings there has been a matter of approximately $14,000 or $15,000 since we have had them. There is charged to this item of expenses interest on the sums expended, taxes, etc., and an overhead charge. If you want the items, I will give them in detail. In connection with the upkeep of water filings, we have a number of men employed there doing work in connection with the filing made by the Interior Development Company, such work as can be done under these present circumstances, litigation on hand, in cleaning the face of the cliffs and side walls of the canyon, and they have been doing such work as the engineers suggest to them from time to time in the way of investigation.

Q. Have you ever adopted a plan of development there, the Eastern Oregon Land Company?

A. Well, the plan that J. G. White & Company have suggested is the plan that seems very feasible to me.

Q. Has the Eastern Oregon Land Company ever adopted a plan?

(Testimony of Walter S. Martin)

A. Eastern Oregon—no.

Q. In any way?

A. No.

Q. And has the Eastern Oregon Land Company been directing the work in the river that you have just referred to as the upkeep of the water filings?

A. Well, I suppose, yes. I suppose the Eastern Oregon has.

Q. On what plan of development is all the rock being dumped into the river?

A. Well, it is on the plan of a dam at the site of the Interior Development Company's damsite.

Q. What kind of a dam?

A. Reinforced concrete dam.

The loose rock and stone being dumped into the river are wing dams as I understand it, for the purpose of diverting the water from the ledge that is right behind them. I suppose that the ledge will have to be cleared away before we can get very far with any development, even the preliminary development work. The pile of rocks in the river is not to be a component part of the concrete dam. That I suppose is a sort of preliminary construction affair. I suppose they are part of the plan adopted by the Interior Development Company. I have never thought much about that. I have asked the engineers to instruct the men what they could do there that would be of a useful character. The men have been working on that ever since we owned the property, and I presume they were working there before. I do not know.

(Testimony of Walter S. Martin)

Q. Who of the engineers is directing that work?

A. Well, the last time I went up, Mr. Thompson who was the engineer of the Interior Development Company; in fact the last times I was up there, Mr. Thompson.

Q. Is Mr. Thompson in the employ of the Interior Development Company or the Eastern Oregon Land Company?

A. He has been engineer of the Interior Development Company. We are the owners of all the stock of the Interior Development Company now, and Mr. Thompson will be paid by the Eastern Oregon Land Company.

I do not know how many days the men have worked during the last year. I could furnish you with a statement of about what their average working days are. I am not up there constantly enough to say how much they work. In expense it is considerable. I suppose it amounts to $3000 or $4000 a year.

Q. Isn't it a fact, Mr. Martin, now to be frank, these men are just working there in an attempt to keep alive the filing of the Interior Development Company?

A. That is exactly what I said they were there for.

Q. And not working under any plan at all, are they?

A. No, the Interior Development Company has a plan on the records.

Q. They are just dumping rock into the water there in an effort to keep that filing alive?

A. I think they have gone further than that. I

think they have done a more useful thing than merely dumping rock in the water; they have cleared off or been instructed to clear the surface of the canyon walls; when they got underneath the Deschutes railroad track, there was a large protest about their undermining the right of way when they stopped.

That was last September, I think. The purpose of going under the track was to strip the loose debris off the canyon walls. Eventually it would have to come off before the dam could be attached to the wall.

Q. Was it to carry out any plan of construction there that you have adopted or determined upon? That is what I want to know.

A. Our plan of construction there is along the line of the J. G. White plan. Long before you can say you will build a particular kind of dam there is a certain amount of preliminary investigation to be made. All this is useful for that purpose; it is what they are doing. If it isn't then our notions are different; that is all.

I think most of the expense was actual labor. There might have been a small amount of tools, and this expenditure has extended over a period since 1909.

Q. Your complaint alleges that you at all times maintained in the State of Oregon an agent with whom the Deschutes Railroad Company could have agreed. Who was that?

A. Fred Holman was our attorney in fact as a foreign corporation, and Balfour, Guthrie & Company are our general agents.

Q. Were they the persons you referred to as being

(Testimony of Walter S. Martin)

at all times able to treat for right of way, and had full power to give right of way to the Deschutes Railroad Company?

A. No, they haven't got any authority that would bind the Eastern Oregon Land Company; they couldn't agree about a matter involving the sale of real estate nor part with any interest in real estate which the Eastern Oregon Land Company held, without its express authority.

Q. Then, as a matter of fact, you didn't maintain an agent in this state all the time with whom the Deschutes Railroad Company could treat, and who had authority to treat on behalf of the Eastern Oregon Land Company?

A. Wel, it depends on what you mean by treat.

They could treat but they could not conclude. The Board of Directors would have to authorize anything that involved the sale of any of its property. We had not in mind to construct this dam or power project until this litigation is finished, nor until we have acquired the rights of way in addition to those we have, necessary for the project, and not until the property looks profitable from the market point of view. The location of our market for power depends upon the demand at the time. I would think there might be a demand growing here in Portland from the past history of Portland. The demand here at present is well supplied but on an extravagant basis. Whether or not we can furnish it here is simply a matter of competition. It depends upon how cheaply we can manufacture it. From my recollection

of the J. G. White report, it does not state that the development at Sherar's Bridge would be more expensive than ordinary. The report of J. G. White & Company was made on the 3rd of March.

Q. And his report is the first report that ever suggested any dam higher than sixty feet, isn't it?

A. No.

Q. What report suggested over?

A. I think Whistler's report suggested a higher dam.

Q. That will speak for itself.

A. Yes.

Q. In any event, you hadn't considered over sixty feet until after you received White's report?

A. I hadn't considered the kind of development they were going to make there at all, as far as that is concerned.

I think the stock of the Interior Development Company was delivered to Balfour, Guthrie & Company on December 1st, 1909, and they paid the money that was paid at that time, $10,000. I think the payment was made on December 1, 1909, and entry was made on the second.

Under the Whistler plans, all the power house projects, that is power plants, with the exception of one, are put on the Oregon Trunk side of the river. I do not remember what the reason was that induced him to put them on that side of the river. His were mostly, though, surface plans. They were either pipe lines or

(Testimony of Walter S. Martin)

short canals or short tunnels. His plans provided, however, for a power plant, and all but one contemplated the power plant on the Oregon Trunk side, and anything on that side of the river, of course, would not be interfered with by the Deschutes Railroad Company.

REDIRECT EXAMINATION.

The best of my recollection of my interview with Mr. Morrow, the right of way agent of the defendant company, in March, 1910, is that I had received a report from J. G. White & Company, which had been made up for the purpose of determining which was the most efficient and economical plan for the development of the Sherar Bridge property; that their recommendations were in favor of a dam very much higher than anything that had been spoken of in connection with the site above, which was over one hundred feet, and that if we could reach a conclusion that would be amicable, I was willing then to agree on a right of way, contemplating less than the whole height which they recommended, but as we had associates in this property and as the property represented the expenditure of a good deal of money in the purchase, we could not give them a right of way without charge, but we would therefore have to ask for damages on the basis of the opportunity we had there. I don't remember what else we said, but I went up to see Mr. O'Brien and the matter was all re-hashed again with Mr. O'Brien, and I have a kind of vague idea that Mr. Cotton came in or somebody else. The matter was left in that position. Nothing was done about it. I think men-

tion was made in the conversation about our having given the right of way on the lower project. I said that this project at Sherar's Bridge was different—the considerations were different from those that had moved us in giving the right of way at the lower site. Down there, there was litigation going on; the railroad was having enormous difficulty in getting over the dam site, and had to extend its right of way out upon the Columbia River on a sort of switchback to get up over that height. Also the lands were in litigation with Moody and were part of the grant to The Dalles Military Road Company, and comparatively did not represent a large cost, as the Sherar lands did. These were all the considerations that moved us to grant them a right of way down there without any cost at all, but contrary in this case, we had associates; we had an expenditure; there were not any particular difficulties present in crossing here; they had crossed immediately below us at the government site at a very much higher elevation than anything that was proposed at the Sherar site—I think at 100 or 110 feet, and the government still, I understand, retains their right to make them move their tracks there when the government gets ready to develop that site. At our lower site the railroad went to a height of 140 feet, providing for a dam 140 feet above ordinary high water. The work for the maintenance of the water filings of the Interior Development Company has been maintained constantly ever since we took hold of the matter up to this time. The dam site is on our land and the course of the river throughout the distance where

(Testimony of Walter S. Martin)

the water will be diverted is on our land; we have the land on both sides and the Deschutes is not a navigable river. This map shows the lands of the Oregon Trunk Railroad Company, the right to overflow which is granted by the contract with that company, and lying within the flow line. The Oregon Trunk Railroad Company's lands are marked in brown; The Eastern Oregon Land Company's lands are colored in yellow; the right of way granted to the Oregon Trunk is orange; the land granted to the Oregon Trunk for a station is brown. The lands lying along the railroad and running to the line between sections 17 and 20, colored in buff, show the right of way. I call attention to the fact that the map does not show the right of way which we granted through the rest of our lands, but only up apparently to the damsite. The flowage rights were reserved as to the lands when we granted the right of way. The flow line would extend up the White River to the distance that is shown in our ownership, so the engineers have reported who ran this flow line out, the flow line of the 60-foot dam. This map says flow line 67 feet 5 inches above mean low water, which is allowing 7½ feet above a dam 60 feet high.

The map referred to by the witness was marked Plaintiff's Exhibit 32, and accompanies this record, and was objected to by attorney for defendant as incorrect and also on the ground that the same was not substantive evidence of where the flow line was running.

The proposal is to build a dam to lift the water sixty feet. Then below the water line there are tunnels that

run through the hill and they carry the water down to a point opposite the power house, according to the White project. The proposed power house is to be down the river, below the Sherar buildings at a location that will be indicated on the map to be introduced hereafter. The tunnels will carry the water under pressure to the power house through the hill. I do not think it would be feasible to proceed any further with the adoption of a plan for the development of this water power, or its development, until the respective rights of our company and the railroad company in that location are determined.

RECROSS EXAMINATION.

I do not know whether exhibit 17 illustrated the situationt here as it appeared in 1909, but the wingdam mentioned by me is shown in said exhibit. There was apparently no railroad along the side here at that time. It was taken prior to the construction in 1909. Exhibit 28 is a photograph of the wingdam. Exhibits 32 and 34 also show it.

REDIRECT EXAMINATION.

The document now shown me is the report of Mr. Kelly on this power site, which we received with other documents turned over by the Interior Development Company.

Said report was offered in evidence by the plaintiff and received.

(Testimony of Wm. McKenzie)

I do not know how the engineers got their mean low water marks. Mr. Whistler had made recognizances on the ground, but I think it was not determined until afterwards where a sixty foot dam would go from mean low water. He said he could not determine from the Boschke profile, because Boschke could not tell him from what point the distance between the water and the railroad could be estimated, and he did not have the water level. Eventually Hammett determined where the sixty foot elevation from the low water mark would strike on the ground. We got it on the ground.

The said Kelly report was received in evidence and marked plaintiff's exhibit 33, and the report made by Thompson was received in evidence as Plaintiff's Exhibit 34. Same accompany this record.

WM. McKENZIE, called and sworn on behalf of plaintiff, testified as follows:

I am employed by Balfour, Guthrie & Company, who are general agents in Oregon for the Eastern Oregon Land Company, and I am in charge of the work of the sub-agents. I am familiar with the history of these transactions, respecting the land formerly owned by the Sherar estate, the Interior Development Company, and the Wasco Warehouse & Milling Company, in the Deschutes canyon, which are involved in this suit. The negotiations for the purchase of the property through Laughlin and other parties concerned, began some time during the summer of 1909, the contract of purchase be-

ing dated about the 5th or 6th of August. The negotiations were between Mr. Laughlin, Mr. Simmons, and Mr. Martin. I was present a good deal of the time. I was a subscribing witness to the agreement of August 6, 1909, between the Eastern Oregon Land Company and C. B. Simmons, and that is my signature thereon. Mr. Simmons signed in my presence. I could not state the date of the signatures of the other parties. Mr. Simmons signed, I think, on the date of the instrument. I passed the contract on to San Francisco after it was executed by Mr. Simmons. We were in almost every day touch; Mr. Huntington, Mr. Laughlin, Mr. Simmons, and the various parties concerned. I recall that the vendors were instructed to get their abstracts of title and put them in the hands of lawyers, and I would say probably immediately upon the signing of those contracts, the process of showing title was set in motion. That is also my signature as a subscribing witness upon the agreement of August 5th, 1909, marked Complainant's Exhibit 2. It was signed in my presence by Mr. Laughlin on the 5th of August. The alterations on the face of the contract, changing a line and some of the following matter being stricken out at the foot of page 3, and the top of page 4, and an interlineation being made with a pen immediately after that which is stricken out, according to my recollection were communicated to Mr. Laughlin, and he subsequently ratified the action. I would not say that it applies to the line which is deleted in pencil. I have not a sufficiently close recollection of that, but I think it applies to this and I am sure it ap-

(Testimony of Wm. McKenzie)

plies to those in Mr. Flanders' handwriting and in this paragraph here. The interlineation at the top of page 4 with a pen is in Mr. Flanders' handwriting. The paragraph in a different colored ink just before the signature was in before the signing. I signed the writing of December 1, 1909, plaintiff's exhibit 5, on behalf of the Eastern Oregon Land Company, by Balfour, Guthrie & Company. I think it was signed on the 1st day of December, 1909.

Thereupon plaintiff offered in evidence the documents referred to in the foregoing testimony of the witness, together with the other documents identified in the deposition of Mr. Laughlin, and same were received and marked Plaintiff's Exhibits 2, 3, 4 and 5, the defendant objecting as to Lot 2, Section 3, Township 4 South, Range 14 East, and the North half of the Southeast quarter of Section 35, on the same grounds as were stated in the objection to the deed of the said lands. Copies of said documents accompany this record.

The final negotions for the purchase of the Interior Development Company's holdings on behalf of the Eastern Oregon Land Company were made by me. There was no written contract. The Interior Development Company's property was passed by the delivery of the stock and the company's organization. All the stock was taken over by the Eastern Oregon Land Company. The transaction was closed on the first of December, 1909, and the money was paid on that date. The first money was paid to Mr. Laughlin on the 1st of Decem-

ber, and entered up in this account on the 2nd. The succeeding payments were February 1st and March 1st, making for Mr. Loughlin $23,000. The Interior Development Company money was paid, the first $10,000 December 1st, the second sum through Mr. Laughlin March 31st.

Mr. Whistler never was given at any time I know of any authority to adjust with the railroad company questions as to the height to which the railroad should go. His services were in the way of investigation or advice. Before we purchased I had seen quite a number of engineers' reports on the Deschutes River. It was a familiar study in the early part of 1909. The question of a right of way for the Deschutes Railroad Company over the lands in controversy in this suit was never taken up in any form by the railroad company with Balfour, Guthrie & Company as representatives of the plaintiff corporation. I remember having gone to the railroad people and having conversations on probably three occasions—once on the street and twice with Mr. Morrow in his office, conversations of an informal nature. I was in his office on those occasions on other business. I remember also of two occasions being in the office of the attorneys of the railroad company, not on business connected with the right of way, but during my visits there we talked some about it. On one of those visits when I saw Mr. Morrow, I remember him speaking to me about having met Mr. Martin on the train coming down from Salem, and their having had some conversation on the subject

(Testimony of Wm. McKenzie)

of this right of way. He did not make any claim at that time or in any conversation with me near that time, that he had reached any agreement with Mr. Martin about the matter.

Q. When did it first come to your knowledge that the railroad company claimed to have any permission for right to be upon those lands because of any conversations with Mr. Martin? That is, was it before or after the bringing of this suit?

A. I think some time in the early part of September there was some floating talk came to me about it. I cannot recall exactly where it came from. There were a good many people talking to me about the Sherar property. It might have come from Mr. Huntington's offic, or from Mr. Laughlin, or Mr. Simmons or some other of the numerous people that were usually talking about the business up there.

Q. Did that talk have reference to conversation with Mr. Martin or any negotiations with him, or was it with reference to other persons?

A. I don't know who told me first of all about the statement that Mr. Morrow claimed to have come to some sort of an arrangement with Mr. Martin. I can't recall who first told me that.

CROSS EXAMINATION.

The stock of the Interior Development Company was delivered to me by Mr. McCornack. I think it was equally divided between himself and Mr. Welch. The

arrangement was that he was to have an interest in the property, the Sherar property and the Development Company property, the combined properties that we had acquired. Welch, personally, apparently didn't want to sell and he was willing to take an interest in that way, and he turned over the stock of the Interior Development Company to the Eastern Oregon Land Company. Mr. Welch continued to be president of the Interior Development Company. Mr. Burns, the head of the Balfour Guthrie office here, became an officer, director, and I became an officer of the company. Those are the officers today. I was not in any way connected with the Interior Development Company prior to the 1st of December, 1909, nor was the Eastern Oregon Land Company interested in it prior to that time.

The conversations had with Mr. Morrow were had at the time and in connection with the delivery of the deeds for the right of way over the lower property, and the conversation in connection with the Sherar property was had, I think, I rather bantered Mr. Morrow about his slowness in getting the business through. I think he said that they had arrangements with the Sherar heirs, that they were to go on the property. I did not treat the talk as serious at all. It was just in a jocular manner. I did not go to him to treat with him with reference to the Sherar site. I think my first intimation that Mr. Morrow claimed to have a right or permission from Mr. Martin to go on that land was in September, 1909. I don't think I communicated that information to Mr.

(Testimony of Wm. McKenzie)

Martin formally. I think the next time Mr. Martin came to Portland, I talked to him about it. He was back and forth between San Francisco and Portland during that period, periodically, not cintinually. I did not write any letters to Mr. Morrow, denying his claim, or questioining his authority for making any such statements. I thought Mr. Morrow's proposition was so unthinkable that it was nothing short of a joke. Any railroad company that would expect to take the whole side of that canyon for a right of way for practically nothing at all, it would be absurd.

A. And you thought it so much of a joke, that you wouldn't even communicate with Mr. Morrow, or take the trouble to write immediately to Mr. Martin about it.

A. I haven't said that I didn't write to Mr. Martin about it. I haven't said yet that I did not inform him, but so far as Mr. Morrow's talk was concerned, I did not take it at all seriously.

Q. But if you thought it was such a preposterous proposition, Mr. McKenzie, wouldn't it be natural for a man of your business ability to take some means to ascertain the truth of such a rumor, and communicate with some person in authority to look into it?

A. No, I think if I were to take stock of all the preposterous things that arise, I would be a very busy man.

Q. Even in connection with the agency which you are handling?

(Testimony of Wm. McKenzie)

A. No. In connection with any agency or any business, one cannot busy himself with every ridiculous story that comes around.

Q. You just cast it out of your mind and let them go along.

A. I didn't take very much stock in it.

Q. Did you state about when you thought you communicated that fact to Mr. Martin?

A. No, I didn't state when. I will ascertain it if I communicated it officially. I will ascertain if I communicated it to him under—at least personally. I usually have something in my office records to give me a clew to times and dates.

Q. And you didn't do anything to check the matter up or save the Deschutes Railroad Company from proceeding on that assumption.

A. I think it is quite probable that I mentioned Mr. Morrow's talk to Mr. Huntington, or to the Deschutes Railway people just in the same way as I would mention anything else that had arisen about the property in a casual way. I was in touch with them off and on nearly all the time.

Q. You don't recall now from what source you got that information?

A. No.

Q. And immediately upon hearing it, it struck you as most absurd?

A. Yes.

(Testimony of Wm. McKenzie)

REDIRECT EXAMINATION.

Q. When you had your conversation, however, that time with Mr. Morrow, he made no claim to you that he had such an arrangement with Mr. Martin, did he?

A. No.

RECROSS EXAMINATION.

I think along in August or September or October, 1909, a profile of the Deschutes Railroad was submitted to the Eastern Oregon Land Company through Balfour, Guthrie & Company. I cannot recall the exact time. I have a record of it, though.

REDIRECT EXAMINATION.

Mr. Martin made no report to me of having made any such agreement with Mr. Morrow. I think all the business arrangements which the company was making here, were as a matter of business practice, referred to me.

RECROSS EXAMINATION.

I am familiar with the signature of John T. Whistler. The letter handed me is signed by John T. Whistler. It was addressed to Balfour, Guthrie & Company, dated October 6, 1909, and doubtless received by Balfour Guthrie, in due course of mail, about that time.

Said letter was offered in evidence by the defendant and received, and marked Defendant's Exhibit B.

(Testimony of Wm. McKenzie)

Said letter is as follows:

John T. Whistler
Mem. Am. Soc. C. E.

G. Stubblefield
Assoc. Mem. Am. Soc. C. E.

WHISTLER AND STUBBLEFIELD
Civil and Hydraulic Engineers
Chamber of Commerce Building
Portland, Oregon

Portland, Oregon, October 6, 1909.

Balfour, Guthrie & Co.
Board of Trade Building,
Portland, Oregon.
(Attention of Mr. Mackenzie)

Gentlemen:

Referring to your instructions by Mr. Mackenzie some ten days or so ago by telephone to take up with the two railroad companies now building up Deschutes Canyon the matter of their locations at Shearer Bridge power site and also your instructions to obtain from the two railroad companies as definite a proposition as possible concerning rights of way and locations desired at the Moody site, I beg to report as follows:

Deschutes R. R. Co.—Moody Sites: I was unable for some days to see Mr. Boschke, chief engineer of the Deschutes Railroad Company on account of his being out of town, and later, on account of his illness. As soon as I was able to see him, however, he advised me at once that he would recommend to his company that a deed of right of way be asked for throughout the Eastern

(Testimony of Wm. McKenzie)

Oregon Land Company's land for the lower power project.

I had prepared a drawing, showing the areas required for construction of the power plant, and thus fixing the limit of their location at that point on the river side. Mr. Boschke had such a location made on the ground, and advised me that it would cost about $19,000 more than their present location and asked if the company would not agree to let them construct on their present location, provided a satisfactory agreement were entered into or it be made a condition of the deed that they change their location at the power site at any time in the future it may be requested by the Eastern Oregon Land Company.

I advised him that so far as I could see, there could be no objections to this, provided such agreement could be made sufficiently binding on the part of the railroad company and approved by the Eastern Oregon Land Company's attorneys.

The matter was then turned over by Mr. Boschke to Mr. Morrow, tax and right-of-way agent for the railroad company, with instructions to prepare the papers which they would execute. I have called up Mr. Morrow several times and have called at his office twice, but so far, have been unable to obtain the papers proposed.

I called last yesterday afternoon and told Mr. Morrow that it was essential that my recommendations to the Eastern Oregon Land Company in the matter be

made at once, and he promised me sincerely to have the matter taken up at once and try to get me the papers today. If they are received before the last of the week, when I leave for a week or ten days' trip, I shall transmit them with appropriate recommendations.

Deschutes R. R. Co.—Shearer Bridge Site: As I had advised you he would do, Mr. Boschke at once turned over to me blue-print of their location and profile for some miles above and below Shearer Bridge site and expressed a readiness to give us any information their office had, which would in any way assist us in considering the matter.

The profile handed me does not show elevation above water surface of river at proposed dam site, but Mr. Boschke states from what information he has in his office, that he believes the location is about 70 feet above water surface at dam site. Our levels in conjunction with the elevations shown on profile would indicate that their location is only about 60 feet above water surface, but it is not certain which datum the bench mark from which our levels run refers, and I doubt if absolute assurance can be gotten without sending a man to the site to determine.

In either case, however, I am reasonably certain the railroad company would object seriously to raising their location. An 0.8% grade was used by the company in climbing over the U. S. Reclamation Service's dam site, and this has been adopted as their maximum grade. From their profile, it appears they have used this to climb over

(Testimony of Wm. McKenzie)

the Shearer site, and to go higher would require them to change their location, not only throughout the entire climb, but as much farther north as necessary to obtain the increased elevation by length of line.

Oregon Trunk R. R. Co.—Moody Site: Immediately on receiving your instructions to take up the matter of locations with the Oregon Trunk Company, I called on Carey & Kerr, attorneys for the railroad company, to ask how I could get into communication with their chief engineer's office, in order to consider with them the matter of their location over the Eastern Oregon Land Company's property. I advised them that my instructions covered also the Shearer Bridge power site and that I assumed the Eastern Oregon Land Company had acquired an interest in this project.

Judge Carey, who appears to have most of the work of the Oregon Trunk Company, was and still is absent in the East. Mr. Kerr advised me that he had written a letter to Mr. Flanders, as attorney for the Eastern Oregon Land Company, and probably in reply to some letter from Mr. Flanders, stating that they expressly waived any claim or title to right of way on account of construction work now being done on any of the Eastern Oregond Land Company's lands.

He also said that Mr. Kyle, chief engineer for the company, was absent in the field, that the Chief Engineer's files and data are all at The Dalles, and that there are no maps or data here in Portland, but that he would write Mr. Bethel, assistant chief engineer, at The Dalles, and try to arrange to either have him come down to

(Testimony of Wm. McKenzie)

Portland or fix a day when I could see him at The Dalles to go over the matter.

A few days later I telephoned Mr. Kerr again and was advised that he had received no reply from Mr. Bethel, but that he would wire him immediately. Yesterday Mr. Kerr called at my office and showed me a letter from Mr. Bethel which referred only to the Shearer Bridge matter.

I asked Mr. Kerr again as to the Moody site location. He again referred to having done all that he regarded necessary at this time by his letter to Mr. Flanders referred to above.

I then asked him if I could report to the Eastern Oregon Land Company that the Oregon Trunk Company did not wish to take up the matter further now as to location over Eastern Oregon Land Company's property in connection with Moody site, and he replied this appeared to be about the way it stood.

Some reference was made by Mr. Kerr to my having no authority in any case to execute any agreements for the Eastern Oregon Land Company, and I take it from this that Carey & Kerr at least have decided to do business with the other parties to the litigation as to title to these lands.

It is just barely possible that Mr. Kerr preferred to do business with an attorney as representing the Eastern Oregon Land Company rather than the engineer.

(Testimony of Wm. McKenzie)

This would perhaps be natural, but I took pains to advise him, when I first called, that I was not authorized to do anything further than to obtain from them their location and grades, in order to properly advise the Eastern Oregon Land Company as to the effect of such location on proposed power project. I think, therefore, his action reflects the probable policy of his company at the present time.

Oregon Trunk R. R. Co.—Shearer Bridge Site: This matter has been taken up with Mr. Kerr along the matter relating to the Moody site. Mr. Bethel's letter referred to above stated that they would not have their location sufficiently advanced at the Shearer Bridge site to consider it with us for a week or ten days. They didn't appear to be very anxious to take up this matter with the Eastern Oregon Land Company. However, as it now stands, I am to be advised as soon as Mr. Bethel has his locations sufficiently advanced to consider it, which he expects will be in about a week or ten days.

I have made a note to call them up about this time, and unless you instruct me to the contrary, I will do so and get all the information I can as to what they propose for their location.

Very respectfully,

John T. Whistler.

JTW-ER

The Moody site referred to in the letter, is the lower site on the river claimed by the Eastern Oregon Land

(Testimony of A. Welch)

Company, and for which the Eastern Oregon Land Company right of way deeds were given.

A. WELCH, called and sworn on behalf of plaintiff, testified as follows:

I was connected with the Interior Development Company from the time it was organized, and had to do with such transactions as the company had in connection with the Sherar Bridge power site at the time the railroad was surveying up the Deschutes River. I was president of the Interior Development Company during 1908 and 1909. I remember the water right filings being made by the Interior Development Company on the waters of the Deschutes River at the falls above Sherar Bridge in the year 1908. The Interior Development Company, up to the time it turned its rights over to the Eastern Oregon Land Company, kept up the development work continuously on that power project. During the year 1909 I went to the office of Mr. O'Brien, president of the Deschutes Railroad Company, in the Wells Fargo Building, some time I think in September, in company with Mr. Isaac Anderson of Tacoma. We took some maps of the Deschutes River—and went over to find out how high the railroad would be at the point of the dam site. We met Mr. O'Brien and talked over the matter, and he told us he would take us down to Mr. Boschke's office and show us the maps of the river, their surveys. We went down to Mr. Boschke's office and he showed us the maps. During our conversation Mr. O'Brien told him that we were one of about 150 filings that should

(Testimony of A. Welch)

be taken care of on the Deschutes River. Mr. Boschke said that he had run his lines, and asked for the maps showing the height, which we examined. Then they asked about the right of way and we told them that if they would protect our filing, there would be no charges for the right of way. We specified the height of the dam as sixty feet, that we desired. The representative of the railroad company said that he had taken that into consideration. They showed us the maps of the railroad grades and heights, which showed, as I remember it, between 64 and 65 feet above low water. They had at that time already raised their levels to that height before we made a request for it. We discussed with them our water filing and they said they were familiar with it.

That is my signature as president of the Interior Development Company, on the blue print attached to the water filing made in the year 1908, plaintiff's Exhibit 19.

We decided that that height would satisfy us as far as the railroad was concerned—I mean the height allowing for a sixty foot dam. I am familiar to a certain extent with the values of lands comprising sites available for hydro-electric development in this part of the country. My business is operator of electric light and power properties, and I am or have been connected with the power properties at Baker City, Walla Walla, Pendleton, Eugene, Corvallis, The Dalles, Independence, Salem, Chehalis, Centralia, Yakima, Lewiston, Seaside, Newport, Vancouver and various other smaller towns,

(Testimony of A. Welch)

and have been an officer and owner in the companies operating those plants in those towns, and also connected with the ownership of electric railways and other large consumers of electric power in connection with these plants. I have examined the Sherar power site and am familiar with the lands in controversy.

Q. I would ask you now to state to the best of your ability the market value of these lands, in view of all the capabilities they have for different uses.

Mr. Wilson: I object to that, your Honor, as immaterial and irrelevent to this controversy at this time.

The Court: He can answer the question.

A. The value will depend on whether it is salable or not, and construction, and various other items that might enter into it. If you want to know what I consider the Interior Development Company and Eastern Oregon Land Company's property worth at that point, I can give you my notion about it.

Q. What is your opinion?

Mr. Wilson: Same objection.

A. $250,000.

Q. You are interested in this property?

A. Yes, sir.

CROSS EXAMINATION.

Questions by Mr. Wilson:

You are still president of the Interior Development Company, are you?

(Testimony of A. Welch)

A. Yes, sir.

Q. You are still interested in that property are you, individually?

A. Yes, sir.

Q. Now, when you went to the railroad company's office, they produced the profile showing the height of the proposed railroad at that place. Is that correct?

A. Yes, sir.

Q. And you expressed your satisfaction with that?

A. Yes, sir, with the map.

Q. And did you consider that that elevation would permit you to construct the dam in the manner in which you desired?

A. We were satisfied we could construct a dam so we could get sixty-foot fall.

A. And how had you in mind to construct the dam for that purpose?

A. Well, we had in mind putting in some flood gates one way; and another one was with splash boards.

Q. And that was practicable, you considered?

A. We considered it was practicable, yes.

Q. And you desired to have the railroad constructed there at that time, did you not, Mr. Welch?

A. How is that?

Q. I say you were anxious to have the railroad constructed there at that time, provided you could still maintain your power development?

A. Yes, sir.

Q. In that manner?

A. Yes, sir.

(Testimony of A. Welch)

Q. And you so expressed your satisfaction to Mr. O'Brien and Mr. Boschke. Is that not correct?

A. Yes, sir.

Q. And advised them that they could go upon the land and construct on the elevation shown on that profile, and if they did so, that they could have the right of way free of charge, as far as the Interior Development Company was concerned?

A. Yes, sir, that was the understanding.

Court: Mr. Welch, what did you say Mr. Boschke said the elevation of the road would be above water?

A. Above low water?

Court: Yes.

A. The map he showed us was between—as I remember it now—between 64 and 65 feet.

Court: Sixty-four or seventy-four?

A. Sixty.

Court: That is sixty-four?

A. Or five feet.

Court: Yes, sixty-four.

Q. (Mr. Wilson) That is above low water surface?

A. Yes, sir, above the low water surface.

Court: You thought you could construct a 60-foot dam without interfering with the railroad; is that what you thought?

A. That was our opinion, yes, sir.

(Testimony of James R. Thompson)

Q. (Mr. Wilson) Who was interested in the Interior Development Company with you at that time?

A. Mr. McCornack of Salem, E. P.

Q. Did you and he own all the stock of the Interior Development Company?

A. Yes, sir.

Q. Was Mr. McCornack satisfied with that arrangement?

A. Yes, sir.

JAMES R. THOMPSON, called and sworn on behalf of plaintiff, testified:

My business is consulting engineer. I have had experience as engineer in hydro-electric work with the Portland General Electric Company from 1891 to 1904. After that I went into the consulting business. I was consulting engineer for the Lewis and Clark Exposition and different power companies of the Northwest here, principally companies Mr. Welch had an interest in. I am familiar with the power sites involved in this litigation on the Deschutes River. I went out to go over it in 1906, early in the spring or late in the winter, and have been going there since that time on an average of several times a year. I was then employed by the Interior Development Company. A survey was made under my direction in which the levels were run out. The first work in that connection was in October, 1908, in which I determined the natural development and the low water as it was then above the falls at the Interior

(Testimony of James R. Thompson)

Development Company's dam site. From my surveys, the fall of the river from the Interior Development Company's dam site above the falls to the point designated in White & Company's report as the power house site, is thirty-nine and a fraction feet, one or two tenths. That is the natural fall between those points. By a dam sixty feet in height at the damsite of the Interior Development Company a height of ninety-nine and one or two tents feet of water would be given, plus whatever water would be going over the crest of the dam. My recollection is that damsite No. 1 designated in White & Company's report, is about a foot lower than the Interior Development Company's damsite. In October, 1908, I made measurements to locate the low water point at the damsite. The following year I took a party there and put them to work, and we ran a set of levels on a seventy-foot contour, to where it met the flow of the river, the Deschutes River, above the proposed damsite of the Interior Development Company. At the time of running this seventy-foot contour, there was some construction under way by the Deschutes Railroad Company opposite the mouth of the White River and I had the men run levels across and determine the level of their grade, as it then existed at that point, and also from the grade of the railroad to the damsite. Their grade stakes were in for the construction of the road and that determined approximately where the railroad grade would be at the damsite. This was done about the middle of September, 1909. My recollection is that they were building at the damsite—they were

(Testimony of James R. Thompson)

working on the wagon road leading to Shaniko, but they had not started on the rock work for the railroad grade. Further up above the damsite there were parts of the grade that were in more or less completed condition and which we ran levels to. As we could determine from the roadbed above White River, it was about four feet below the seventy-foot line that we were running and approximately five to six feet at the damsite, that is from their grade stakes. We ran out at that time a seventy-foot contour line to determine what would be flooded at that height. I made a map based on that survey and forwarded it to the Interior Development Company under my signature. In 1913, I made some measurements and found the Deschutes Railway about four and half feet below the grade of the Oregon Trunk on the level stretch of the track above the damsites and about five and some tenths feet at the damsite, between five and six feet. My measurements differed by about a foot from the low water elevation, 715.3, which the railroad company has given heretofore. My low water datum was an iron peg driven in the bed rock of the Deschutes River, and the Oregon Trunk grade now stands 71½ feet above that. I have made computations as to the loss of power that would be occasioned by a loss of head at the place of these damsites, owing to any curtailment of the dam that might be caused by the railroad.

Mr. Wilson: I object to that, Your Honor, until it is shown that there is any right on the part of the

complainant to build a dam even 60 feet high. I think that this evidence as to the curtailment is out of place and I certainly object to it as immaterial and irrelevant in this controversy. They have not proved any right to go even 60 feet.

The Court: Let the evidence go in, and defendant is allowed an exception.

The Witness: With four feet loss of head it would be practically 1/25 of the power to be developed there. That is four per cent. It is a little bit more than that.

Q. Have you made a computation of the amount of power that would be developed there with the dam 60 feet in height, if so you can give the figures.

Mr. Wilson: I should like to make this objection go to all this testimony.

The Court: Very well.

A. The amount of power that could be developed there would be approximately 75,000 theoretical horsepower peak load, which is arrived at by taking as a base the flow of the stream of 4350 second feet, which is arrived at from such records and knowledge of the stream as I have. The minimum flow of this stream is considered between 5100 and 5200 second feet at Sherar's Bridge. Making certain deductions for loss of water by reason of irrigation of the lands along the upper waters of the river, I have taken 4350 second feet as a probable minimum flow of the Deschutes River at Sherar's Bridge. That would give a 92-foot effective

(Testimony of James R. Thompson)

head to take care of certain pondage losses, which would give 45,000, nearly 46,000 theoretical horsepower. I have taken into consideration the use of this pond created by the dam to carry the plant on peak loads, that is, at the time when power is in most demand. This would add enough to bring up the difference during peak load to 75,000 theoretical water horsepower. On that basis there would be 46,000 horsepower continuously for 24 hours without the use of the water in the pond, and a maximum available of 75,000 horsepower for peak load by using the water in the pond. That is, of course, considering the use of flash board on top of a 60-foot dam, and drawing down the pond several feet below the crest of the dam. From an engineering standpoint, a 60-foot dam refers to the distance from the low water on the down stream side of the dam to the crest of the dam as constructed.

Q. Crest of the masonry?

A. Yes, the crest of the top of the dam, of the overflow.

On a masonry dam to be built in such a location as the one in question, a spillway of about 450 feet would be proper, which is the width practically of the level bed of this stream and which is very nearly the total width of the gorge there. If a dam is constructed in that location, taking into consideration the probable rise of the river at times of high water, it would require 7½ feet to take care of the recorded floods of the Deschutes River at that point, that is, it would require a depth of water over the crest of the dam of 7½ feet to take

care of such floods as the records show have occurred in recent years. That would be the level of the pond above the crest of the spillway. I am counting on about 30,000 second feet being taken care of by the 7½ feet of depth. I know the recorded floods or the volume of water at high water stages, which has been reached in recent years, from the U. S. Geological Survey and other history which I have gathered at the bridge. I cannot state the flow for the different high water seasons that have recently occurred offhand without looking at the records definitely. They run from about 15,000 second feet to about 30,000, that is, the high water stage. In my investigation I ascertained that there had been higher floods than those within the recorded time. The United States records go back to about 1905. There are no records that I have found beyond 1900. I got my information from people who have lived on the river covering a period of say 40 or 50 years back.

Mr. Wilson: I object to that as hearsay.

The Witness: They identified elevation points to which the water had arisen, and there were signs showing the elevation to which the water had reached during those floods which I could observe.

The allowance to be made for caring for flood water over the height of dams depends on the character of the stream and its history. Where a stream, like the Deschutes, with its ratio of known high water to low water, which ratio is very small, and the topography of the country from which it draws its water especially at

(Testimony of James R. Thompson)

freshet stages, I should allow at least 100 per cent, which I did in this case in taking up with the Oregon Trunk Railroad the height of the grade. I doubled the amount of the volume of known record—that is, I allowed for a possibility of a flood of double the amount of those recorded, and determined that it would require to care for the flood waters approximately a little over ten feet. If a flood of 60,000 second feet should come, that would cause a depth over a dam with a 450 foot spillway of approximately ten feet.

Q. What is the character of the river bed and the sides of the canyon as to adaptability for the construction of a dam there?

A. The river bed and the sides of the canyon consist of enormous lava flows. So far as can be observed they are continuous, that is, no intervening material between them. The rock is very hard and firm, occurring in layers of different grades or flows.

Q. What is the character of the road bed of the railroad alongside the damsite and alongside the pond that would be formed by the construction of a dam at this point, referring particularly to the Deschutes Railroad Company's road bed?

A. At the damsite the roadbed is a fill, the outer edge of which is built upon the old wagon road, the old Shaniko wagon road, which itself was built up with a pile of rocks and bound together with sagebrush, a thing peculiar to all Mr. Sherar's road construction. Above the dam the road is in some places in open cuts, some places in through cuts, some places built up on top of

fills on rocky bluffs, that is, I mean a bluff 30 or 40 feet in elevation. The original ground consists of volcanic ash and on top of that was built the fill that made the roadbed. In other places along the roadway the roadbed or grade is built on top of the soil which is light volcanic ash in different points. In other places it is solid rock, but there are points in the road there that are of the construction I have indicated, light volcanic ash.

If a dam sixty feet in height were constructed at any of the damsites under consideration above the falls in the river, the roadbed would be overflowed at times of high water, that is, basing on the maximum of 30,000 foot discharge. In my opinion as an engineer, after having inspected that roadbed, I would consider that if a sixty foot dam should be constructed there, certain portions of the roadbed would be in hazard at all times. On other parts of the track, the grade might stay in.

The effect of the inundation of those tracks and the rising and subsiding of the waters over them would be that in many cases the tracks or grades would slough out into the pond with the rise and fall of the pond. If the river should rise to a stage of 60,000 second feet, a good deal of track would be washed out and all of it would be submerged. All of such power plants as this would be if a dam sixty feet in height should be constructed, it is quite practical to use flash boards to raise the water at seasons of low water and they are often used. Many new power plants with high dams are being

constructed with different types to procure the same results as flash boards to increase the pondage for storage of water and also to increase the pressure. The height of flash boards that can be used will depend on the design. At Oregon City we usually rose about three feet. They could be constructed with suitable framing of any reasonable height. It is simply a mechanical problem, with ability to loose them at times of freshets so that they would either drop down or go down the stream. With a sixty foot dam there, six foot flash boards would flood the track on the level stretch about five feet or something like that on the incline before the grade ceases at the damsite. I am familiar with other power plants that are in operation sending power into the city of Portland. The total horsepower that they furnish to the city, as nearly as I can determine at the present time, is between 60 and 70 thousand peak horsepower during December or peak season of the year at peak load, that is to say the busy season. During low water in the summer they have three steam plants in this city that are operated more or less, that is, the hydroelectric plants that are now sending power here are supplemented with steam power during the low water season. The electrical horse power furnished from the water power plants during low water season to the city of Portland is approximately as follows: Perhaps 2500 or 3000 horsepower from Oregon City and 14,000 horsepower from Clackamas—they would have a little more than that because they have the ability to carry over on the peak there with pondage, but in the total

horsepower hours used it would be equivalent to about 14,000 horsepower, 24 hour power there. On the Sandy River I am not quite sure whether they have either two or three units in, which would give them in the neighborhood of about 10,000, not over 10,000 horsepower, which they could deliver at this time. The Northwestern Electric Company, which is the new company just coming into the city, could perhaps deliver six to eight thousand horsepower at low water on the White Salmon; not over that. The capacity of their power plant is double that. They have two 6,000 kilowatt units there, but they have only enough water to run one of them at low water. They are delivering 12,000 to 16,000 horsepower to the city when they have plenty of water, if not used elsewhere. The Oregon City transmission is fourteen miles; the average of Cazadero and River Mill plant of the Portland Railway, Light & Power Company, is about 36 or 38 miles. The Mt. Hood is thirty some miles out. The Northwestern power plant is, I should say, approximately 60 or 70 miles from Portland. It is practical to transmit electric power the distance between Portland and the Sherar's Bridge power site. There are many places where it is transmitted greater distances. I have looked over the Sherar power site to determine the extent to which the existence of the railroad as located there would increase the cost of the installation of the power plant. The dam would be a cyclopean masonry dam and the best rock to be obtained in close proximity to the dam would come from the side the Deschutes Railroad is on. That would

(Testimony of James R. Thompson)

be one of the items which would entail expense. There would be from 20,000 to 30,000 yards of rock used in the dam and I suppose it would add half a dollar a yard or something like that to handle it unless you are free to do as you please along the railroad grade there with the shooting and other things. Also the railroad is built where the outlets and inlets or pipes of the tunnels would have to be. That would necessitate some form of bridging at that point. That is true as to both the inlets and outlets of the tunnels. That would perhaps cost at both places 20 or 25 thousand dollars at least. At the power house site there is quite a lot of debris which the railroad company has dumped down on the ground. It would have to be removed—three or four thousand yards I would say offhand, which would have to be carried down stream or up stream from the direction the power house is in and dumped in the river, because it is enough to form an impediment to the tail of it. Most of that debris is large rock, pieces weighing from a ton up and down. They were thrown over the grade or over the bluff at the time the railroad was built, dumped right down, filled up the wagon road and let it fall over the bluff, that is, the old Grass Valley wagon road. They were placed there by the railroad company at the time of construction. There is room enough between the railroad tracks and the river at the power site to build a power plant, that is, a power house and to take care of the outlets and inlets to the tunnels. My recollection is that it is less than 150 or 250 feet wide. It would be necessary to remove that rock before the site would be

available, and the expense would be in the neighborhood of $2500 or $3000.

Q. State whether the railroad made any change in the location of the Grass Valley wagon road at the power house site.

MR. WILSON: I would like to object to this, there is no allegation in the complaint that would warrant any such testimony. There is nothing in the complaint about changing the Grass Valley wagon road and it is certainly outside the issues in this case.

THE COURT: You can answer the question and an exception is allowed.

A. The cost of making the change would be between $16,000 and $18,000.

The road as now reconstructed follows the bench grade below the old road, I should say 30 or 40 feet lower down, and passes through the ground on which the power house would be constructed and the other accessories of it. In order to make the power site available, it would be necessary to build the road from where the Shaniko road crosses the railroad grade and carry it above the railroad up there around Buck Creek and across it at that point and there join the Grass Valley road. When I was at the power site in November or December, 1913, I observed that there were fences along the right of way above and below the damsite. The railroad company has fenced the land adjacent to the water's edge in places. If the railroad company were to claim and obtain a right to prevent the flooding of

(Testimony of James R. Thompson)

the land that it has fenced, it would not be possible to construct a power installation there extending more than a little beyond the natural fall of the river, that is to say, it would confine the power plant to the natural fall of the river. The railroad company has built a building on land of the plaintiff in controversy here at the station where the Shaniko road crosses the track going down to the Sherar Bridge, and also a fence on the east side of the railroad track. The width of the right of way which has been fenced in varies, running in places up to several hundred feet, I should judge. I am familiar with all the streams capable of affording commercial water power within the zone which might be made tributary to the city of Portland. I do not know of a stream on which it would be possible to develop any amount of power that I have not been on, and I have been engaged in the examination of such streams for a good many years. The power site on the Deschutes River at Sherar's Bridge in controversy here, is one of the largest possible developments that is tributary to Portland; one of the very largest, that is, in one development. As a basis of comparison of minimum and maximum flow of other streams which are used for power purposes, the ratio between the maximum flow and the minimum flow of the Willamette River, for example, is about one hundred to one, that is to say, the volume of water at high water is one hundred times what it is at low water. The minimum flow of the Willamette River is a little less than that of the Deschutes and the

(Testimony of James R. Thompson)

Deschutes River in a year approximately has twice as many acre feet.

MR. WILSON: I would like to object to this line of questions on the same basis as the objection I have made heretofore, that there is no evidence in this case to warrant testimony as to the possible development at this point because they have shown that they have no right to develop to the maximum or even to 60 feet at this point, and I move to strike out all the testimony of the witness to the effect of the highest possible development, and I would like to object to all this line of testimony.

The Witness: The Willamette River, I should say offhand, runs at low water between 2500 and 4000 second feet below the influx of the Clackamas. The Clackamas has from 600 to 700 second feet minimum flow, and the ratio of maximum to minimum of the Clackamas is 50 to 1. The ratio of maximum and minimum of the Deschutes River, as far as the recorded years go, is 6 to 1. The fact of the small difference between the maximum and minimum flow regulates the hydraulic possibilities of the stream in variation of head, in the expense of taking care of excessive flows and in the continuity of power, the small variation being advantageous. For example, the best comparison is between the Willamette and the Deschutes. In the Willamette River, on account of the excessive runoff at certain times, the head is practically lost so that but little power can be de-

(Testimony of James R. Thompson)

veloped except by a double set of turbines, thereby doubling the hydraulic cost of development. In the hydraulic plant at Oregon City there are two sets of turbines, one for high water and one for low water. At times the high water drowns the power. I was thirteen years with that company; five as superintendent. The great rise involved is very disadvantageous to the power plants. I do not know of any other power sites within the Portland zone affording better opportunity for the manufacture of power than is afforded by this site under consideration. I have made computations to ascertain the cost per horsepower of an installation which would deliver the power from that site to the city of Portland. On a basis of maximum capacity of the plant for power delivered at Portland to be 44 to 50 thousand horsepower, it would cost approximately $90 per horsepower—in the neighborhood of four million to four and a half million dollars for *for* complete development of power delivered here. That would be a very low unit cost compared with the plants already installed.

On the Clackamas plants I know approximately the cost of production per horsepower. It runs from $150 to over double that. To manufacture the power and transmit it to Portland from the plant on the Deschutes would require a rate per horsepower annually, to cover all charges including the interest charges on the cost of construction of the plant, of approximately $15. I cannot state definitely at this time the amount of steam power that manufacturing plants here are using outside

of that used for generating electricity, but at the last investigation I made here two years ago, over 10,000 horsepower were being so used, and there is perhaps 25 to 30 thousand horsepower created here by steam and converted into electrical energy. The cost of creation of horsepower here by steam is sixty to seventy dollars per horsepower per year. I prepared the map or blue print which accompanied the filing of the Interior Development Company on the water power at the falls above Sherar's Bridge, plaintiff's exhibit 19, as engineer for the company. I would not consider as engineer for the company that an elevation of 64.5 feet of the railroad track at that point was sufficient to permit of the construction of a sixty foot dam there. With proper allowance to take care of the flood waters, there should be an elevation of seventy feet for the grade of the railroad, which corresponds practically to the grade of the Oregon Trunk.

I have been employed frequently during years past to investigate and report upon the value of water power property in this part of the country, have done practically nothing else for the last ten years, investigating and reporting on them for the physical and practical values of development.

Q. Do you know the market values of such properties as the one in controversy here?

MR. WILSON: I object to that, your Honor.

THE COURT: He can answer the question; I don't know what it has to do with this case, though.

(Testimony of James R. Thompson)

A. I would consider the Sherar property worth half a million dollars to the company that is going to develop it.

CROSS EXAMINATION.

I am employed, I presume, by the Eastern Oregon Land Company—the Interior Development Company. I have given directions for a number of years to the development work claimed to be carried on there. I have given orders and directions for the men doing the work up to recently, at least. Exhibit 28 shows approximately the development of the work as it existed in the summer of 1909. The work shown in that exhibit is on the east side of the river, that is, on the same side as the line of the Deschutes Railroad Company. The work shown there is approximately forty feet above the up stream side of the dam as laid out by me.

Q. Under what plan of development, Mr. Thompson, was that work being done?

A. The rock was pulled out so that we could ultimately examine there thoroughly the bed rock at that point, and there was debris from scalping the sides, and debris on the rock on which we expected to build the dam. We had from one to half a dozen men employed there.

Q. And for what period of time?

A. Why, as I recollect this work, the men were working on there in 1906 down to the present time; not altogether at this particular place, but what is originally

(Testimony of James R. Thompson)

—or what is known as the Kelly development, as we term the island development there.

Q. Then this work has no reference whatever to the plans you have been discussing, the plans of J. G. White & Company?

A. Not to my knowledge. They are the Interior Development Company's plant.

Q. And this work has no reference to any dam except for recognizance purposes?

A. No, sir.

Q. And wouldn't be a component part of any dam?

A. It would. It wouldn't be a part of the dam. It is simply a fill there so that we can, when we want to, have a place to work on to protect us from the water. I cannot say offhand how much work has been done there since that was put in. We have worked on both sides of the river and a lot of the work we did the railroad company filled up. Defendant's exhibit 32 shows the same work as exists today.

Q. How much more work has been done on Defendant's Exhibit 32 over and above what is done on Defendant's Exhibit 28?

A. On account of the view being upstream and hiding the place where the excavation is, none of the work can be shown, what has been done on either of those places.

Defendant's Exhibit 34 shows additional work. It shows the work scalped up towards the fill of the old Shaniko road. Some of this has been done since 1909. I cannot say definitely how much. Some of it was

(Testimony of James R. Thompson)

done about a year ago and some previous to that. I cannot state how much. There was about two years, as I recollect, between 1909 and 1910, that I was not on the ground. To the best of my knowledge, work has been done there continuously since 1909. I cannot state as to how many men have been employed continuously there, and I cannot state definitely as to how much work has been done since 1909. I do not know how much money it cost. The books of the company will show. There have been men there continuously at work.

Q. But there has been no work, up to the present time, with reference to constructing any permanent dam at that point?

A. There has.

Q. Where is it?

A. On both sides of the river, the bed rock has been scalped and cleaned.

Q. When was that done?

A. That work was started in October, the latter part of October, 1908. In connection with that there were surveys made for running a canal from the top of this 60-foot dam to the ground above the power house site. We dug test pits, ran lines, took slope measurements. I think, if I mistake not, part of it is shown in this application here; and more or less of that work was obliterated when the Deschutes Railway was built. They filled in——The only work that has been done since 1909 has been cleaning out at the damsite, to my knowledge. That was done under my direction.

(Testimony of James R. Thompson)

Q. Now will you kindly produce the plan under which that work was being constructed?

A. There is the sketch and the original filing.

Q. Where is the plan of the dam?

A. I don't know. I may have an office copy and I may not have.

Q. Who gave you this plan for construction?

A. I made a report to Mr. Welch at the time this was talked over, a 60-foot dam, and gave him a cross section of it, sketches of it, and it was decided on at that time.

There was no contract ever entered into. We were doing all the work there ourselves at the dam.

Q. Did you have detail drawings of this dam?

A. Had sections as far as we could develop them, cross sections of the river; that is what slopes and sides had to jut in the river channel.

Since I have been under the direction of the Eastern Oregon Land Company, I have been continuing under the same plan. They never advised me that they had adopted that plan.

Q. You were working sort of at random without any——

A. No, sir; just ordered me to continue it, that is all.

Q. Well, where was the power house to be under that plan?

A. It would be the same power house as shown in this filing here; located some distance below the bridge there, on the east side of the river.

(Testimony of James R. Thompson)

That is, in the north half of the southwest quarter of section 35, just about half way between the forty line. There is a bluff there. That is, a ridge of basalt very pronounced, fairly level, sheer into the water at that point; below one or two indentations of the bluff follow until you get to Buck Hollow, and the power site is located approximately on the sixteenth section line between the northeast quarter and the northwest quarter of the southwest quarter of section 35. That is the point where all the debris was thrown over the side of the hill by the Deschutes Railroad Company, and that is the plan that the men have been working on for this length of time. The dam site is in section 3, township 4, range 14, and the power site is in section 35, township 3 south, range 14 east.

The intention is to run the water from the dam down in conduits on to section 35. I was last up there in June, 1913. I have checked up the work that was being done there to see how the men were progressing. It has not altogether been completed.

Q. How much longer do you anticipate it will take?

A. It would depend on how fast they would work and whether we could get under the Deschutes Railroad grade to see how far we would have to go in for bed rock.

I do not know whether the men are working at the present time. I couldn't say that but I presume they are. The large house shown in Exhibit 17 is known as

(Testimony of James R. Thompson)

the Sherar residence. Defendant's Exhibit 17 shows the general lay of the land above the falls, and the development work that was done there approximately in 1909. Defendant's Exhibit 31 shows the Oregon Trunk station on the west side of the river; the Deschutes station is located below the falls. The Oregon Trunk is above the falls about a mile, I should say. There is about a mile or a little more difference between the two stations, may be more, one and a half miles. Defendant's Exhibit 30 shows the falls of the Deschutes River. The falls are below the proposed dam location. I think the corner here shows where I found the bed rock and went up and scalped out. It is approximately 600 to 1000 feet above the falls to the Interior Development Company's damsite. The fence shown in the exhibit is the fence built on the lower side of the wagon road on the Shaniko grade, that is the grade that is put in to take the place of the Shaniko grade by the Deschutes Road. That was built by the Deschutes Railroad Company, to the best of my knowledge, and the fence also. It seems to be in pretty good shape, well painted.

Defendant's Exhibit 29 shows the Interior Development Company's damsite on the east side of the river. That is where the bed rock has been scalped out up to the Tygh valley road and above it; there is the scalping that shows there, and that is the wall scalped out, filled right out into the river here to stop the break of current there.

Defendant's Exhibit 15 is a closer view of the falls. Defendant's Exhibit 14 is a view of Sherar's Bridge.

(Testimony of James R. Thompson)

I don't know what date though. Defendant's Exhibit 13 is a view of the same point. Likewise Defendant's Exhibit 11. That is a view of Sherar's Bridge, barn, house, and the old blacksmith shop. The road on the left of the fotograph is the Grass Valley road, leading towards Buck Hollow. That is the same one that now goes through the power house site. At the point shown in the exhibit it has not been changed, but under the old construction it wound up the top of the bluffs and went along, I should judge, approximately 50 or 60 feet above where it is now at that point. That is a fair representation of the road and the condition of it as it existed at that date, and the road all the way up the hill was approximately the same. It was a macadam road where it was not the natural bed rock. Exhibit 33 is where we piled up dry wall to dump the rock behind on the west side of the Interior Development Company damsite. That is over on the Oregon Trunk side. That is the Tygh Valley road there. This work was started in October, 1908. I cannot say when the rock piling was done. It was done at different periods along there as it accumulated, and part of it was from rock that was thrown down at the time of the construction of the Oregon Trunk road. We had it all cleaned out at that time, and then had to remove an immense quantity of rock to get down to bed rock again. These exhibits show practically all the development work that has been done there up to the present time, except the work that has been covered up in some places by the railroad grades, etc. The river washed out part of the work;

only once, however, to my knowledge. On the east side part of the pile was washed out. The half a million dollar valuation given by me on the Sherar property referred to the Sherar property as it existed in 1909, and as now claimed by the Eastern Oregon Land Company. I am unable to state definitely how far up the property extends. In stating my estimate, I am considering the property as a hydraulic development. I cannot state how high a dam could be built at the damsite without throwing the water back beyond the Sherar property.

Q. I will hand you defendant's exhibit C for identification and ask you if it should develop that the Sherar property along the river ended at the south line of the northeast quarter of the southeast quarter of section 9, what height of dam would you say could be constructed at the Sherar damsite?

A. I do not know.

A. I have run levels, or have had levels run, and a 70 foot contour made to where the 70 foot contour met the fall, the natural fall of the Deschutes River, some place at or about what is known as Oak Springs, and I have never considered it from any other point of view.

The 70 foot contour line goes back about three miles. That would flood the land on sections 3, 10, 9, 17, 16 and 21, all in township 4 south, range 14 east. That is, it would be 60 feet plus 7½ feet under a 30,000 second foot discharge. There might be a little bit in

(Testimony of James R. Thompson)

Section 8, and it would back the water up in White River, too.

Q. If it should develop that the Eastern Oregon Land Company had no rights further south than a point in Section 9, the right to construct a dam would be very much curtailed, would it not?

A. I do not know.

I have seen a good many maps prepared by the United States Geodetic Survey. I have used them in connection with my examination of some properties. I presume the figures marked 719, 721, 725, etc., together with arrows pointing to the river, represent either the mean low water, or low water level at that point, as determined by the United States engineers.

The datum referred to in the United States survey as so many feet at various points on the river is not the same datum used by me.

Q. What did you find the elevation of the low water at the damsite to be?

A. I assumed it there, having no base to work from, an elevation of 700 feet at one point, I think, as I recall it. It was a stone that we could refer to for the foundation of the blacksmith shop, and from that worked both ways. There were no benches at that time carried into the country, so I simply assumed the elevation of the river there. We could equate that at some future time if we choose to.

I have never equated it with reference to the line, My elevation was done with reference to low water mark

(Testimony of James R. Thompson)

as I established it myself. There was no established water mark on the river at that time to my knowledge. The top rails of the Oregon Trunk line were 71.5 feet above the low water mark as I determined it. The Deschutes Railroad is 5.67 approximately lower right at the damsite of the Interior Development Company. Defendant's Exhibit C for identification, shows the difference between the two lines exactly as I found it to be. 250 feet further up I found it to be 4½ feet difference.

Q. Now, it is entirely practicable to construct a dam there with flash boards.

A. Why, I have always figured on building this 60 foot dam with flash boards.

Q. And there is no reason why flash boards should not be used at an elevaion lower than 60 feet, is there?

A. That would depend on the construction of your flash boards.

Q. Well, there would be no difference in the construction part of it from 58 to 60, than from 60 to 62, would there, above the low water?

A. It would depend on the purpose for which you were going to use those flash boards.

Q. Wouldn't the flash boards maintain the water at that elevation just as well as two feet higher?

A. If they were mechanically constructed so that they could stand the wear and tear.

There are a dozen ways by which the flood waters of streams are taken care of at a dam. The use of flash boards is not altogether a common practice. I heard

(Testimony of James R. Thompson)

Mr. Welch's testimony this morning that he contemplated taking care of the water there by means of gates or flash boards.

Q. And that is a practical method, is it not?

A. Well, that would depend on to what state you were going to take care of it, and whether you were to take care of a drift and the like, which is at times in the Deschutes River.

I have seen logs two feet in diameter and 40 or 50 feet long, along the river bank at times. Above Sherar Bridge there at one time, the Indians for several years got their fire wood from one pile. There is very little drift wood in the Deschutes, however, compared with other streams.

It would be practical on a small sized dam to use gates in the bottom of the dam to take care of flood waters. Of course, you could build stony gates or something like that, possibly, at a large expense. I have seen sketches of a syphon dam. That is not, to my knowledge, coming into use to any great exent. I have examined it only enough to realize that it is something of a freak. I can see it might be stopped up with logs and drift.

Q. Well, the end of the syphon is below the surface of the water, isn't it?

A. Yes.

Q. If that syphon is low enough, how does it get stopped up with logs?

A. Suppose a sawyer was floating down stream;

that is, a tree with its roots submerged; usually the lighter part of a tree is buoyant and above water; it would be very apt to get into the opening of the syphon.

Q. That sort of thing is liable to cause trouble with most any dam?

A. No, not if the dam is well built. It might ride the crest of it until that could pull it off, or might go over.

I have never seen any of these sawyers floating down the river. I have seen some on the bank that have been deposited there.

I have read the J. G. White & Company report. I don't know whether I have examined the Whistler report more than some discussion that has come up on it. Whistler's report provides for a power plant on the west side of the river on three of the alternative plans. I would not say that it is entirely feasible to construct a power plant on the west side of the river.

Q. You think Mr. Whistler's report then is not well considered?

A. Well, doctors differ; so do engineers.

It depends on the personal equation. I do not know the extent of Whistler's experience. I understand he has had considerable experience in large construction for the government. I know him by reputation. I know he has been with the Reclamation Service.

REDIRECT EXAMINATION.

The construction of any style of dam which would undertake to care for the flood waters in emergency,

(Testimony of James R. Thompson)

would be very expensive. It would require a great deal structural steel, hoisting devices, controlling devices, that is, whether it was a needle dam or a stony gate dam, or wicket gate, or bear trap. Numerous devices have been used for that purpose. Money could not be stinted on in its construction as it would absolutely have to operate; it would have to be built without regard to money, with just the one idea of operation, so it could operate. There are two types of flash boards used. The type that I had in view for use on this 60 foot dam was a cheap construction, using possibly 1 x 12 lumber, with a small angle or ledge put in on the top of the dam, and posts about 3 or 4 feet high, and boards put in, made of perhaps 4 x 6 or 4 x 4, not heavier than that, with cables running through that so that at any time the flash board could be wrecked if they were not wrecked by a raise in the height of the river. At Oregon City we raise the river three feet with similar construction. There the river wrecked it or it was easily started by pulling a few props.

It would be practical to construct flash boards that would take care of the flood water question, if the expense were not considered.

About 33% of the Deschutes River—about 16 or 17 hundred second feet, originates above Bend. That would be, say three-tenths. If that were all diverted for irrigation purposes, according to my experience as an engineer, I would say fifty per cent of the water would return to the channel, or the flow of the river would not be

diminished by over fifty per cent by that diverted. In other words, it would be taken out of the river in the earlier spring season and when the water already in the ground was running back into the river from the irrigated sections, that would continue the flow when irrigation had ceased and the water returned. The best example I know of that is the Umatilla River. I measured the river in 1906 or 1907. I think it was eleven second feet at Umatilla River mouth. Since the irrigation projects have been developed along the river, there are something over 115 or 120 second feet—I would not say just exactly the second feet showing. They are now developing what is known as Irrigon, which was a waste on account of lack of water before these other irrigation schemes like the Hermiston or other irrigation projects were carried out, that is the diversion of water on the upper river for irrigation has in this case increased the low water flow at the mouth of the river. The ground to a certain extent acts as a storage and lets it out gradually and uniformly. If storage works should be placed on Crooked River, there would be more water in the Deschutes than ever before at low water season. There is very little water, only a few second feet, in Crooked River at low water as it is now. It practically goes dry until you get to the mouth of the river, where there are local springs. If there were extensive storage works on the upper waters, the seepage would increase the flow.

In the Sherar Bridge location we are somewhat favored in deciding on the dam site as to making super-

(Testimony of James R. Thompson)

ficial examinations, compared with many other places. The river has eroded within a thousand feet below the dam so that at low water stage approximately 19 feet below the table rock of the stream above the falls, and at the power house rock nearly 50 feet below may be seen by looking into the water. These basalt layers are fairly uniform in place and in grade, and from that a very good idea of what you may expect to encounter may be obtained. So far as it appears, the rock is admirably suited for the foundation of a dam. There are no fissures or seams of any serious consequence that can be observed.

RECROSS EXAMINATION.

I have not in recent years examined the damsite of the Eastern Oregon Land Company further down the river or what is known as the Moody site. I would not say that the lower site is as favorably located from a power standpoint as the Sherar site. The quantity required to build the dam would be much greater. They can get a great deal more head at the Moody site and could develop power directly in proportion to the dam. I am familiar with the government damsite between the Moody site and the Sherar site. In 1906 or 1907 I made a report to the Reclamation Service for developing the government site for pumping water on the Umatilla Irrigation Project. That is a good site. The only thing, at both of these sites every foot of fall is developed by the height of the dam. There is no natural development. The Moody site can develop approxi-

mately 140 feet and the government site, according to my recollection, can develop about 85, but I believe they have a right to move the railroad or something there.

In connection with the storage up the Deschutes River, the plan is to take water out during the flood season and whatever water they take out will decrease the flow at that time so much.

Q. And that would decrease the likelihood of the high water that you have been referring to?

A. That would all depend on the rate of flow at which it was taken out, and whatever they took out would reduce the water in flood season just so much.

H. C. STODDARD, being sworn, testified on behalf of the plaintiff as follows:

I am division superintendent of the California & Oregon Power Company at Medford. I have had about ten years experience with that company and its predecessors, the Rogue River Electric Company and the Condon Water & Power Company; was also one year with the Citizens Light & Traction Company at Salem; about two years with the La Grande Light & Power Company of La Grande, Oregon, and about one year at Moscow, Idaho. The company with which I am now engaged operates one power plant at Gold Ray, Oregon, and one at Prospect, Oregon, besides plants in California. My connection has been mostly with the Oregon plants. I am an engineer. I have done both construction and operating of various plants.

(Testimony of H. C. Stoddard)

I was asked what additional cost there would be to transmit the power approximately 80 miles to Portland, using the J. G. White & Company estimate of $2,932,000 for 40,500 horse power peak, and I estimated, transmission line $350,000; transformers, $160,000; organization expense, $10,000; discount on securities at ten per cent, $345,210; interest during construction, estimated time two years, average time one year, at five per cent, $189,865, making a total of $3,987,175. This does not include any cost of real estate, cost of water rights or preliminary development expense. I think the preliminary development expense is included in the J. G. White & Company estimate. Fixed charges on an installation of this kind could not be very well less than five per cent bond interest and four per cent depreciation. I think that would be the very least estimate that could be made. The actual cost of operation of the company that I am connected with, operating a much smaller plant, is $2.85 per horse power per year for generating, and $1.85 per horse power per year for transmission. The expense would be much less per horse power on a larger plant. Assuming a cost of $4.70 per horse power a year for generating and transmitting, and $2.00 per horse power a year for general expenses, taxes and miscellaneous expense, and $10 per horse power per year for interest and depreciation, it would make a cost of $16.70 per horse power per year, as the cost per horse power from a power plant built on the estimate of J. G. White & Company with the items for its com-

pletion that I have estimated, delivered in the city of Portland.

I have a published rate schedule of the city of Seattle, Lighting Department, showing the rate for power in quantities over one hundred horse power, one-half cent per connected kilowatt per month, but if the power was used continually, or at 100 per cent load factor, it would amount to $32.65 per horse power per annum. The diversified character of the load frequently enables power producers to sell power for a great many kinds of uses at different hours of the day. Some of the short time power is sold at a very much higher rate than the long time power.

I have a published rate sheet for the city of Portland, as published by the Portland Railway, Light & Power Company. Their rate—it is called their Schedule L for wholesale power—the rate is given as a primary rate of $1.25 per month, per kilowatt of five minute demand; the selling scale of the first 1,000 kilowatt hours per month, two cents; next 2,000, 1½ cents, etc. I estimate from this rate that 1,000 horse power would cost $46.78 per horse power per year at one hundred per cent load factor, or at 60 per cent load factor, $34.62 per year.

There are some recently published statistics from the Bureau of Census, that the output of all stations by kilowatt hours in the United States increased 358 per cent from 1902 to 1912; for Oregon 232 per cent during that time; in the state of Washington 261 per cent; in the

(Testimony of H. C. Stoddard)

state of California, 1044 per cent; and in the state of Idaho, 2207 per cent.

Defendant objected to testimony for the states of Washington, California and Idaho, as outside the range of this market.

The Witness: Respecting the practicability of using flash boards at the damsite under consideration here, the pressure against the flash board one foot wide and five feet high, would be approximately 750 pounds. I have had some experience with flash boards and I personally would not recommend flash boards more than four or five feet high unless they were of very heavy structure to carry that pressure across the dam. The way they are usually constructed, the top of the flash board has to rest on a structural steel of some kind which is four or five feet above the dam in proportion to the height of the flash boards, and the supporting timbers in times of flood catch the drift wood and become a source of danger. Another thing, in case of a rapid rise of the river, it requires quick work some times to get the flash boards off. From my personal experience, I would not consider it practical for such a situation as is present here to go above four or five feet with flash boards.

In engineering parlance, a dam 60 feet in height, or a dam 60 feet above low water, means that there is 60 feet from the base of the dam to the crest, measuring from low water—I mean to the crest of the dam.

(Testimony of H. C. Stoddard)

CROSS EXAMINATION.

I never head of any difference of opinion among engineers on this matter. I would consider a dam 60 feet high one that raised your effective head 60 feet. Very few dams are of the same height all the way across. They are generally set in a V-shaped depression in the bed of the stream, and I would consider a sixty foot dam one that increased your head sixty feet at that point. Any dam that would increase your effective head sixty feet from low water is a sixty foot dam.

I have never been on the Deschutes River at all.

Q. What data do you have to make your figures on here?

A. I was simply asked to make some figures on a transmission line and transformers. I did not examine the route over which this transmission line would go, or the difficulties of getting materials in and out.

Q. Then how did you arrive at your figure of $350,000 for transmission line of 100 miles.

A. From other transmission lines that I have built.

I have constructed some over rather rough ground. The step-up and step-down transformers are the transformers which raise the voltage from the voltage generated at the power plant and steps it down into the receiving end to increase the voltage on the transmission line, and reduce the losses in transmission.

I could not say how much, under the Portland Railway, Light & Power Company's tariff, would be paid

(Testimony of H. C. Stoddard)

by a line like the Southern Pacific Company per horse power, as I do not know how many horse power they would use. I have seen some estimates of railway engineers, by which they said they could pay three-quarters of a cent per kilowatt hour for power and electify roads at a profit. The Portland Railway, Light & Power tariff, from which I figured, is the cheapest tariff that I have been able to find published in Portland. The largest wholesale amount that is given in this tariff is $34.62 per year on a sixty per cent load factor. That is the rate on the largest quantity provided in the tariff. I am now in Southern Oregon, Medford. We have one plant of seven thousand, one of two thousand, and we are building a large plant of about twenty-five thousand horse power. We have 275 miles of transmission line in Oregon and California. We have No. 0 wire. With reference to the distance of the distributing line, we have one plant which is 42 miles distant from the nearest point on the main line, which furnishes power for the greater portion of Jackson and Josephine counties, Oregon.

I believe electrical power has been transmitted successfully a little over two hundred miles. It has been successfully transmitted at 110,000 volts, and I think it could be transmitted over one hundred miles with less than ten per cent loss. The amount of loss depends upon the voltage. I am familiar with constructing transmission lines over some very rough country. I have made estimates and then carried out plans. We have been

able to build a good many lines in the last five years where the actual cost was very close to the estimate.

GEORGE L. DILLMAN, being sworn, testified on behalf of the plaintiff as follows:

I reside in San Francisco, and I am a civil engineer; I am familiar with the engineering features of hydro-electrical development for power. I was eight years connected with the Willamette Pulp & Paper Company at Oregon City. In 1896 to 1900 I examined a great many water power possibilities in Oregon and Washington. In California I have been in consultation with various companies—Great Western, the Pitt River Company, the Northern California, and some others. I have had considerable experience also in railroad construction work. My work is that of a construction engineer generally. In 1890 I helped build the Union Pacific extension from Portland to Puget Sound, and at that time had charge of the work from Kalama to Centralia. After spending two million dollars, that work was knocked off. Prior to that I had been with the Union Pacific for several years on various parts of their line. I finished the Astoria road as the contractor's engineer. I was chief engineer of the Western Pacific during the promotion period and up to the finishing of the location and purchase of the right of way. I was chief engineer of the Nevada Northern, a railroad in Eastern Nevada.

In November of last year I inspected the land in controversy here and the railroad of the defendant com-

(Testimony of George L. Dillman)

pany as constructed thereon. I did not personally run any levels but I saw that they were run and have taken it for granted that they are right. They seem right, and the Deschutes road is about four and one-half feet below the Oregon Trunk on the level stretch of grade on which the road passes above the proposed dam of this power company, which is after the Deschutes Railroad reaches its maximum height at that point, 200 or 300 feet above the White & Company damsite. I think it is more than that; I think it is 500 or 600 feet. The profile shows the point.

Q. State what effect the construction, existence, and maintenance of the Deschutes Railroad, as you found it constructed, had upon the value of this power site, giving the elements, figures, and all the various ways in which it effects it.

Mr. Wilson: I would like to reserve the same objection to this testimony that I have before.

The Court: Go ahead.

A. The initial power possibilities at this point were very great. The low water flow is large. The flood volume in proportion to it is small. There is very little drift and no sign of serious ice. Part of these possibilities were killed by the trade with the Oregon Trunk Railroad, limiting the height of the dam to about sixty feet. The construction of the Deschutes Railroad has further cut down the power possibilities at this point about five per cent below what was possible as permitted

by the construction of the Oregon Trunk. The main thing, however, is the liability of the power company in case they have to build with regard to the Deschutes Railroad. If the railroad company has a right to be in its present position, and the power company has to respect that right, as at present occupied, the power company could not develop its power for a great many years, if ever. If, on the other hand, the power company has a right to develope, and the responsibility of friction with the railroad company is entirely to be borne by the railroad company, the damage to the power development amounts to five per cent of the power, plus the extra cost of construction by reason of the railroad being there. The first possibility, entire responsibility in the matter, means that the power possibility is worth very little at present and it is hard to estimate when it would be worth developing.

Q. You mean if the power company is to have the responsibility of caring for the safety of the railroad?

A. Yes.

If, however, the railroad company takes the responsibility of its being flooded, the five per cent element is eliminated. This can be obviated by extending the gradient further south, raising about three miles of the Deschutes Railroad, and protecting it for one hundred feet next the dam with a retaining wall. I would estimate $10,000 for the retaining wall and $70,000 or $75,000 for raising the grade for those three miles.

Q. How high a dam, Mr. Dillman, could safely be built at the point in question, in your judgment, as the

(Testimony of George L. Dillman)

railroad is now constructed, if the power company is compelled to build a dam which will leave the railroad safe?

A. The railroad is endangered in two ways, building a dam so high as to flood the track, and a dam of any height, it would soften the banks and possibly endanger the road in that way.

I made a casual examination of the road bed of the railroad by walking up and back over the railroad. It is located on the canyon side. The banks seem fairly stable now. The cuts are practically all in rock. The raising of the grade would be a change of location by throwing the line further into the hills on the fill. The profile which is an exhibit here, will show what proportion of the grade is built by filling out with loose rocks and dirt, making the grade on the canyon side.

Q. Is the construction such as would be safe if inundated through the rise and fall of the water, if a dam were built such as would cause the tracks to be inundated?

A. I think if we riprap it in some places, it would be safe. But that is merely an opinion, and the fact might develop otherwise. Just what is in those banks I do not know. They seem fairly good. It is an ordinary piece of ground.

To take care of a flood of 30,000 second feet, with a dam at that point of the width called for in J. G. White & Company's report, the water would be above the crest of the dam a little less than 7½ feet. The

allowance made in good engineering practice for caring for floods all depends on the length of the records. If the records go back for many years, 25 to 30 per cent would be enough to add to the biggest known flood to allow for possibilities. Where the observations go back only a few years, you would double it, and in some cases even treble it. When the Portland and Puget Sound Railroad was being built, considerable money was expended in going way back and getting the records of the high water of the Columbia so as to lay the grade line above that point, and this was very carefully done. In 1894 they had a flood that went over that mark some four or five feet the whole length from Vancouver to Kelso. A considerable margin should always be allowed for something above what is known in the way of floods.

Q. According to your computation, as I understand, there should be an allowance of 7½ feet to take care of a flood of 30,000 second feet at that point?

A. I understand that is the measurement of the maximum flood.

Q. In view of the statistics available, as to flood reports, and the short number of years which they have been kept, what height, or what allowance should be made for the flood waters in the construction for a dam there, in your judgment?

A. I think that volume should be doubled in considering the necessary clearance, which would require to care for flood waters over the crest of the dam about 11 feet, 11.1 feet, I think it is computed.

Q. Is there any type of dam or method of caring

(Testimony of George L. Dillman)

for the flood water that you know of, that would be practicable from the standpoint of efficiency, safety and cost, that would make it feasible still to build the dam to the height of 60 feet and care for these flood waters?

A. Under sluices would be expensive, hazardous, precarious to operate, and very unsatisfactory. I think they should be eliminated at once. Some temporary type of top construction might be used, but it would add to the expense and decrease the efficiency, and probably be precarious to operate too. I don't consider either of them very practical for taking care of floods.

If a method were adopted which permitted the dam to be lowered at times of high water, and the construction were exceptionally good and tight at the top, it would make no difference except with the head at flood times. You would lose some head. By adopting any method that would lower the crest of the water at high water, the head would be affected just the amount of the drop.

Q. Take up now, please, Mr. Dillman, the items of the way in which the construction of a power plant would be increased in cost by the existence of the railroad there. Would there be any increase of cost for the inlets and outlets of the tunnels?

A. They would have to pass under the railroad, and the railroad supported across them, and this would be an expense, which I estimate approximately at $10,000 at the inlet and $10,000 at the outlet end, as increased cost.

(Testimony of George L. Dillman)

The cost of handling the rock for construction work on the canyon side would be increased by handling it across the railroad. I presume $6,000 would cover that. I have made these estimates by examination on the ground and the computation of additional work involved. These estimates are not exact. They would depend on what plans were adopted for doing the work. However, if the railroad company should take care of its own tracks and crossing, there would still be a little more additional expense by reason of having to handle the work carefully. I should say $1,000 at each end would be sufficient for that. The plans for supporting the road over the inlet and outlet would have to be the result of conferences between the power and railroad companies. I made an examination of the power house site designated in J. G. White & Company's report. Waste from the cut, which is just opposite the power house, has been deposited on the power site in connection with the railroad construction. That would have to be removed. I looked it over and tried to size it up but without defnite measurements and without a knowledge of how deep it was. I considered that $2500 would take care of that, but that is a matter of estimate. The Grass Valley road will be a nuisance there and ought to be put up on the side of the hill above the railroad. I went over the route that would probably be followed by changing the road so as to take it away from the power house site, and believe that the expense involved in making that change would be about $15,000.

Q. Have you made any computation of what the

(Testimony of George L. Dillman)

loss of the five per cent power which you say a lowering of the height of the dam for 4½ feet occasions, would mean to the project when constructed?

A. Yes, I have made several estimates of that from different viewpoints. The cost of the construction of the dam for 55 or 60 feet, whichever was allowed, would depend on the plan adopted. In order to have the estimates relative, I have considered that the cost of the dam would be in proportion to the square of the height, which is very nearly correct. If the shape of the gorge were rectangular, with vertical sides and flat bottom, that would be exactly true. On the other hand, if it came to a V, and were uniform, the cost would be almost as the cube of the height. This is very nearly rectangular so I have considered that the cost of the dam would be as the square of the height, and in that way I make the difference in the cost of the dam, as between 55 feet and 60 feet, $73,000, which is giving the Power Company a little the best of the argument. Continuing the estimate through, I find that by building a 60 foot dam, the cost per horse power delivered, base, would amount to $160. With the 55 foot dam, power will cost $162.90, making a total difference in cost of construction $158,000, a total difference of base horse power, (that is the average horse power, of 1500 horse power,) so that the privilege of developing the last five feet of head would give 1500 horse power at a net cost of $105.50, or there is saved on the cost of this horse power $57.40 per horse power, for the extra 1500 horse power that could be developed with a 60 foot dam over what could be de-

veloped with a 55 foot dam, so that, at the time of development, when there would be a sale of this power, the loss to the company would be, in this five per cent, $85,000. That is the loss from a construction standpoint. The value of this power would be very materially larger. I am using a flow of 4350 second feet as a basis of this estimate which I think is a low estimate of the water.

I do not believe that the diversion of water for irrigation above is going to deplete the stream at this point. In fact, my experience with the return of water for irrigation is that the low water volume of the stream some miles below the use is increased rather than diminished, and I think that is the universal experience with diversion for irrigation purposes.

I think I am familiar in a general way with the value of land available for power sites in this part of the country.

Mr. Wilson: I want to object to all of this, the same objection.

Q. What, in your opinion, is the market value of such a site as the one herein involved, considering all the capabilities of the site, not simply for the water power, but for the entire uses that might be made.

A. It would be worth a great deal of money if the responsibilities of friction with the railroad company lay with the railroad company itself. It would be worth from half a million to a million dollars. If, on the other

(Testimony of George L. Dillman)

hand, the responsibilities rest entirely with the power company, I do not think it is worth much, and it will be a long time before it will be. This matter of responsibility is, to my mind, the paramount question.

I know nothing of the market price being paid for electric power in Portland at the present time, except what is given by the schedule here. I understand the Southern Pacific is paying one cent per kilowatt hour for the power it is using for its electric line. The rate per horse power per annum at that basis would depend on the load factor. It would be approximately $50 per horse power per annum at 100 per cent load factor. At 60 per cent load factor it would be $30.

I am familiar with the power plant at Oregon City. I am not familiar with the other power plants that are sending power to the City of Portland. The Deschutes power possibilities are very great. It is a most remarkable stream. I think it is the most remarkable stream on the Pacific Coast in regard to the uniformity of flow. There are some others that are somewhat similar, but not to the degree of the Deschutes. The McCloud River is a similar stream, and the Klamath River, but the Deschutes in volume of low water and in small volume of flood water, is the best stream on the Pacific Coast for power purposes. There are no other natural falls on the lower part of the river besides this one. The stream is rapids for a long distance, but there is no other such fall visible.

(Testimony of George L. Dillman)

CROSS EXAMINATION.

Q. Now, Mr. Dillman, the fact that transportation facilities were there would very much reduce the cost of the bare material that went into the dam, would it not?

Mr. Veazie: We wish to make our objection to this, your Honor. That is not a special benefit but a general one. It appears that there is another railroad there also. I think that is not a proper reduction to charge against us.

A. Yes, sir.

I have never estimated the amount of material that would have to be carried in there for the construction of that dam. It would be a large quantity of supplies and cement. The cost of that part of the dam would be very materially reduced by the fact that the railroad is there. If neither railroad were there, the cement would cost considerably more. The debris referred to in my direct examination is located on the river side of the railroad line, probably between one hundred and one hundred and fifty feet from the track.

Q. And you mean all of it is more than 100 feet from the track?

A. Yes, the debris is only in the way of getting the pipe lines out from the tunnel. It is not in the way of the power house.

The power house itself will not ocupy the ground now occupied by the debris.

(Testimony of George L. Dillman)

Q. And that debris is all within 100 feet of the track, isn't it?

A. I think so, yes.

They have just simply cleared it off far enough to make the roadbed. It is just ordinary waste in the construction of the road. The wagon road is right through the power house site. The wagon road would have to be changed. I think the wagon road is outside the spoil-back. I don't remember how wide the spoil-back is. It is just a back thrown out from the cut of the grade, probably 50 feet wide. The wagon road ought to be moved above the track. The power plant referred to is the same power plant that Mr. Thompson, who preceded me, referred to. I think there is but one power house site. The wagon road is within one hundred feet of the center of the track at this point, and the only reason for the moving of the wagon road is that it interferes with the proposed power site.

Q. Now, what do you figure the total cost of a dam 55 feet at that point, at the damsite?

A. I have made those estimates to be relatively correct; not correct in themselves necessarily, but in this estimate I have considered that a 55 foot dam would cost $431,000, and a 60 foot dam $504,000.

Q. And in making this estimate, did you figure in the difference between the transportation cost by railroad, and the cost if the railroad were not there?

A. No, I didn't make two estimates so that I considered the railroad transportation in figuring this cost.

(Testimony of George L. Dillman)

The diversion of water for irrigation storage is ordinarily made in the flood season. The danger of damage to the railroad company in the flood season is lessened by that, but lessened by a very small amount. No storage that will be made on the reservoirs above there would decrease the flood volume at this point appreciably. I have made no estimates of this, but I inspected the country generally some years ago. In 1902 I was state engineer of Oregon and I examined all the Carey land applications in that country; was familiar with the Deschutes. I have not examined the country so that I am familiar with the storage of the water on the upper part of this river, nor on the Crooked River, nor on the Metolius River, but I am acquainted with the Government methods. I am not familiar with their plans with reference to the irrigation project up there.

Q. If they should store flood waters on the upper part of this stream and its branches, what effect would that have upon the danger to this railroad?

A. If they made the storage at the crest of the flood, they would have the maximum effect on the amount passing this point at the crest of the flood, and in that way they would have an effect. But it is generally very largely over-estimated, and amounts to very little. It would not do for the railroad or for the Power Company to run the risk of a small free board over that crest by reason of that storage. You would not change it an inch.

I doubt if all that is contemplated—I say I haven't a knowledge of what has been proposed—would not car-

(Testimony of George L. Dillman)

ry the flood volume of the Deschutes but a few days at most. But the time of making the storage there very seldom catches the crest of floods. I have studied the floods of the Willamette and the floods of the Sacramento very considerably and the storage proposed in the Sacramento, while enormous in volume, it will only take the flood of the Sacramento for a few hours.

Q. And that flow for a few hours stores up enough water to take care of the irrigation for the balance of the year?

A. They have no storage for irrigation to amount to anything at present, and in my opinion—and I have studied the question carefully—all the storage that is proposed at the head of a great stream like the Sacramento, is insignificant and inconsiderable in the matter of taking care of flood conditions.

Q. Then if Mr. Whistler, who was the engineer in charge of these Government reclamation services, estimates that the flood flow would be reduced 25 per cent, you think he is mistaken?

A. I do.

Mr. Veazie: I beg pardon; that was not Mr. Whistler's testimony.

Mr. Wilson: I leave that to Mr. Whistler's deposition.

Mr. Veazie: I think there is nothing of the kind in the deposition. Mr. Whistler's testimony about the 25 per cent is that 25 per cent of the flow at low water stages comes in above Bend.

(Testimony of George L. Dillman)

Q. If his deposition is to the effect that it would reduce the flood flow 25 per cent, you think he is mistaken?

A. If Mr. Whistler and the whole Reclamation Service should say that the storage up there would reduce the flood flow 25 per cent, I would say that they were all mistaken.

Q. How much experience have you had with reference to storage reservoir systems, and the effect on the stream?

A. No one has had much in making storage to reduce floods, because that has not been done, but I have made a considerable study of the question in connection with projects in California.

I am not familiar with the Roosevelt Dam in Arizona. I know where it is and what it is. That is a storage dam to take care of flood waters. The conditions in Arizona are very different. The conditions there are that they have a big flood for a few weeks, and if they have enough to fill the reservoir behind the Roosevelt dam they would be in great luck.

Q. But that is the purpose of the dam?

A. The purpose of that dam, oh, no. It is to hold water for irrigation. Stopping floods is incidental. They get their supply from flood waters of the Salt River, and while we are on this question, can't I say another thing? The time of making storage miles away from the point of damage of possible floods can never be told—the time of making storage to take the crest of the flood cannot be told with any degree of certainty, and

(Testimony of George L. Dillman)

in all probability the storage will be made and the reservoirs filled prior to the crest of the flood; and not only will they not diminish the flood at crest, but they will constitute a menace, and may, by breaking at that time, produce worse floods than would be produced otherwise. That is a very serious question. Any dam is liable to do that.

Q. Now, when you say that you consider the Sherar damsite worth half a million to a million dollars, do you take into consideration the possibility of some structure up the river which would have to be condemned by the Sherar site, which might be even more expensive than the dam which they contemplated?

A. No, I was speaking of the power possibilities, that is, a free right of flowage.

Q. But if it should develop that there was some structure up the river which would have to be condemned before they could realize the possibilities of this dam site, what would you consider the value of it?

A. That value would be reduced by the cost of what they would have to pay for the additional rights.

Q. But you did not take that into consideration in your estimate?

A. I only know by hearsay that there are some rights which they have not acquired, and I did not know it until this trial began.

I went over the tract in November last. I think plaintiff's exhibit 31 is the profile I had with me, and the figures on there I think were made by Mr. Kyle. I know we made some figures on the profile we had along. That

profile was furnished by Mr. Martin before we went up there. He furnished it to me at San Francisco, and I brought it up. I think it was furnished me possibly two weeks or maybe a month before I went up, but I won't be certain.

Q. You say there will have to be three miles of road changed there, elevated to take care of this. Wouldn't there have to be considerable elevation below the dam to reach that additional height?

A. It could be done that way, but it was not my idea to do it that way. I thought you could extend the gradient upstream until you would gain this 4½ feet and protect that short distance above the dam by a retaining wall cheaper than changing the whole development of that maximum grade clear to the tunnel and through it.

Q. Wouldn't it cost practically as much to raise that grade as it would to construct a new line there. I mean original construction?

A. That is the way you would change the grade, I think, change the location, throw the line in the fill towards the hill and operate about through the cuts as they are now.

I think you could operate through the same cuts. It would not be exactly on the same alignment, but it could be done and should be done if you are going to raise the track. It shouldn't be raised in just its present location. I think it could be done for about $75,000. I think I would do it for about that.

(Testimony of George L. Dillman)

In answer to questions by the Court, the witness testified; that he should say, with reference to any material difference in the substance of the canyon walls on the two sides of the river, that they were generally a little firmer on the west side than on the east, that is on the Oregon Trunk side, but he examined the west side from the east. He was on the east side and would not be very certain about that.

REDIRECT EXAMINATION.

I proceeded up above the dam site on the east side of the river just to about the head of the pond, where the pond would be.

Q. Are there any expensive structures or works of that nature such as counsel referred to on cross examination, that would have to be removed if that were to be flooded?

A. Nothing but the railroad as constructed; nothing else.

RECROSS EXAMINATION.

Q. The railroad is constructed there for a number of miles, and that would have to be condemned, wouldn't it if they built a higher line?

A. That seems to me the main question in this case, that if the responsibility were with the Power Company, it would have to be condemned, or else the dam cut down.

Q. They would have to acquire the railroad rights there, wouldn't they?

(Testimony of George L. Dillman)

A. If the railroad has rights, they would have to be acquired.

The Court: You mean within the flow line?

Mr. Wilson: Yes.

The Court: And above the Sherar property?

Mr. Wilson: Up above the Sherar property.

REDIRECT EXAMINATION.

The railroad is on a level grade to the head of the pond—the upper head of the flow line.

Q. If the railroad were so constructed as to permit of a 60 foot dam, the responsibility resting with the Railroad Company, would there be any damage done by the flooding through the construction of a dam to that height, that is, is there anything on the ground that could be damaged from your observation?

A. The banks might be softened some, that is all—that is, the banks under the road.

RECROSS EXAMINATION.

The danger of slides up above the Sherar property would be just as much if the water stood against the embankment there. The same thing would obtain if it were a fill. It would not make any difference on what land it was. The fill does not care who has title to the land.

(Testimony of G. A. Kyle)

REDIRECT EXAMINATION.

Referring to Exhibit 31, leaving out of consideration the pencil marks which have been added subsequently, there is nothing thereon by which the height of the Deschutes Railroad Company's grade above low water level in the Deschutes River at any point in the vicinity of the dam can be determined.

Q. I would ask whether these lands were so situated that they have a peculiar value for railroad construction purposes?

Objected to by the defendant.

A. Yes. A railroad into that country would have to follow one bank or the other of the Deschutes River to get the best gradient going south into the interior of Oregon. There is no grade superior to the canyon of the Deschutes.

G. A. KYLE, sworn on behalf of the plaintiff, testified

I am a civil engineer and have had a great many years experience in civil engineering, in fact, never did anything else. I have been engaged mostly in railroad work, but have had quite a lot of experience in hydraulic, and with some hydro-electric work. The last position I had was chief engineer of the Oregon Trunk. Before that I was assistant chief engineer of the Chicago, Milwaukee & St. Paul, and I was also upon the Grand Trunk Pacific as Division Engineer for several years. I had

(Testimony of G. A. Kyle)

charge of the construction of the Oregon Trunk Railroad through the Deschutes Canyon for quite a long time; was engaged there about 18 months, and was in charge of the construction of the Oregon Trunk line past the power site in question here. I am quite familiar with the lines in controversy and the way in which the two railroads are built at that site and with the situation there. At the time of the construction of the Oregon Trunk Railroad at that point, we allowed for a 60 foot dam at the dam site of the Interior Development Company, and built our railroad between 70 and 71 feet above low water, what we considered low water. In the first place we figured that it would take about 7½ feet of water on the crest of the dam to carry approximately 30,000 second feet, and also we figured there would be a back water curve at the upper end of the pond of 2½ feet. When a river runs down in a pond or level piece of water, there is always what we call a back water curve, begins right at the dam and extends right beyond the end of the dam as far above as it does below the intersection of the river and the level grade, and at the upper end of the dam we figured that it would be 2½ feet above the level water, which would make it practically nine feet of water to take care of ordinary high water, that is, the maximum high water according to the records of 30,000 second feet. So we figured that we ought to go up fully to that height to take care of that, to keep in the clear. I would not consider that a railroad constructed past this dam site, especially if a 60 foot dam is to be built there, would be safe at any less elevation than 70 feet. I raised

(Testimony of G. A. Kyle)

that road up that high. I wouldn't consider it would be safe, no. I have examined the roadbed of the Deschutes Railroad Company at and above the dam site. I would not think that it would be safe to construct a dam at that point 60 feet in height with the railroad constructed as it is, unless we used a great deal of rip-rap on the present banks, at least. If you put in plenty of rip-rap there, I think the danger would be slight. Of course, it might cave out in a few places where the rocks are of volcanic ash—in fact, it is nearly all volcanic ash for a short distance, but that could be rip-rapped, I suppose, and made perfectly safe. Volcanic ash is very light and very easily disintegrated when flooded. Water, I should say, would have a tendency to make it flow—make it flow very easily, move out of place. If a flood of double 30,000 cubic feet per second should occur with a dam 60 feet in height there, it would probably raise the water about 10 feet above the dam, and with the flow of water at flood stage, I should not think the railroad would be in a safe position as it is now. You can't operate over it, at least; probably wash it away in a great many places.

Q. Mr. Kyle, did you make any examination of that power site to determine what items of added cost would be involved in the construction of a dam 60 feet in height for power purposes, owing to the existence of the railroad there, taking up the different items you found to be so involved.

A. Yes, sir, I made an estimate of the cost of certain things there. I figured that about 4000 yards of loose rocks have been placed upon the power site desig-

nated in the J. G. White & Company report, which it would cost about 25 or 26 hundred dollars to remove.

I made an estimate of the cost of carrying the railroad over the inlets and outlets and the extra cost of constructing inlets and outlets for the tunnels owing to the existence of the railroad. I figured the upper inlet—for the cost of the railroad to go over the upper inlet to the tunnel, would be about $10,000, and the lower end just a little bit less, about $9800.00. I figured that there would be an extra cost there on account of the tunnel in under the track—that might be little or might be a great deal, owing to whether the ground would stand or not under the track.

It would vary from probably $2000 to $15,000 possibly. If the ground would not stand under the track, it is liable to cost $15,000. I figure, though, about $3000 to $4000 for that. This is aside from the cost of carrying the railroad over. If a retaining wall has to be built for the protection of the railroad track for the distance from the lower dam site to the place where the railroad reaches the level grade above, I figure that would cost about $10,000. To raise the track there 4½ feet would cost about $70,000. When I was chief engineer, we checked the levels roughly to determine the height of the Deschutes Railroad above the low water grade. Mr. Thompson's men also checked it when I was up there about the 15th or 16th of December. The levels that Mr. Thompson took, I would say checked with the O.-W. R. & N. profile so I assume that profile was right. That made

(Testimony of G. A. Kyle)

the elevation of the O.-W. R. & N. track 781 on the level grade. The Oregon Trunk is 785.5. The difference after the Deschutes reaches the level grade is 4½ feet. There is a difference of 28.34 feet in the datum of the two roads there—the O.-W. R. & N. is that much lower than the Oregon Trunk level. I presume they were both meant for sea level. At dam site No. 1 in White & Company's report, the difference between the height of the two railroads is described as 5.67 feet between the two tracks. That is, the Deschutes Railroad is 5.67 feet lower than the Oregon Trunk at that point. I have made a computation for the heights required to carry the maximum record flood, 30,600 second feet, over the dam at that point, which is 7½ feet with a 450-foot spillway. That is very nearly as long a spillway as is practicable. The dam on top is nearly 500 feet, which would bring the water within about 25 feet of the sides of the canyon. At the time of its construction, the railroad changed the location of the Grass Valley road from the old location which occupied practically the same location that the railroad occupies now, down to a bench nearer the river. The wagon road, before the railroad was built, was in a general way down near the power house, practically on the present grade of the railroad. In order to use the power site, I figured it necessary to change the road from where it crosses the O.-W. R. & N. road now, down across Buck Hollow, I believe they call it, probably 4000 feet, nearly a mile. To make that change it would be necessary to construct a grade above the railroad track, and it would require the moving of

the county bridge across Buck Hollow, too. I computed the different items of expense and the total expense of making that change. It would amount to $15,180.00.

I have examined the computations of J. G. White & Company contained in their report introduced as an exhibit here with the deposition of Mr. Richardson, and have practically figured it all over in a way. I should say their estimate seemed very reasonable and consistent; it is a little high, if anything. I think they have figured the cost plenty high to take care of the construction. I figured what it would mean in the way of loss of horsepower to this project to lower the height of the dam 4½ feet. It would mean a loss of about 1500 base horsepower delivered in Portland, or one and two-thirds times that of peak horse-power, about 2500. It would not make much difference in the loss of pondage, a little but not enough to speak of. It would be the difference in storage of the two, in the contour of the valley, difference in the area of the two bodies of water, one five feet below the other, and a depth of 4½ feet.

The existence of the railroad where it is would make some difference in the cost of handling rock and material in the construction of the dam. I figure there would be about 30,000 yards of rock in the dam, and it would cost 20 cents more to handle it with the railroad there than without it, about $7500.

Q. What is the fact as to the lands in controversy here owing to their situation in the Deschutes canyon, possessing a value for railroad right of way purposes at the time they were taken by the defendant?

(Testimony of G. A. Kyle)

Mr. Wilson: I would like to make that same objection to all this testimony.

A. I know some of them seem to think they are very valuable—some of the people thought so. We paid quite substantial prices for right of way across these properties on the Oregon Trunk side.

Questions by the Court:

How much less value has that tract of land with the railroad through it than it had without—the Sherar tract of land?

A. Do you mean without one railroad or without both of them.

Q. Without the Deschutes Railroad.

A. Well, if you take it as a power site proposition, I should say there was quite a good deal of difference.

Q. Suppose the railroad was located right where it is now, taking the availability as you see it for a power site, how much less valuable is that power site with the railroad located where it is than it would be if it were located 4½ feet higher?

A. Oh, I should say probably $75,000.

I have taken into consideration principally the loss of power through cutting off that height. The Deschutes river is recognized generally as one of the best power rivers in the country, on account of the large minimum flow and small maximum flow, and the stream is free from ice nearly all the year, that is, it never freezes over, I think, and the water is free from drift wood. Those are the main features.

(Testimony of G. A. Kyle)

I am familiar, in a general way, with the various water power sites now undeveloped and within the Portland zone, that is, so located that it is commercially practicable to bring the power to this city, and I know of no other power site within that zone where power can be developed as cheaply and as advantageously as at the Sherar site.

Q. When you answered yesterday to the question of the court that you considered the lands of the plaintiff corporation involved in this suit to be worth $75,000 less with the Deschutes railroad located where it is, than if it were located at an elevation of 4½ feet higher, what elements of damage were you taking into consideration specially by the difference in the height?

A. I really meant the power, the difference in the value of the power itself. The figure I gave applied especially to the loss of power from the difference in height.

Q. In connection with your answer, I would ask whether you intended that estimate of $75,000 to include any of the items of the extra expense in the development of the power which are caused by the railroad being there, no matter which location it might be, that is, the extra cost of construction and the other items which would arise from the railroad being where it is?

A. I would add to that for the extra cost of construction of the plant and the right of way through the property.

Q. Were you taking into consideration in giving that answer, or not, the fact that the plaintiff company

(Testimony of G. A. Kyle)

or whoever might develop the power, might alleviate the situation as much as possible by the use of splash boards or other expedients?

A. Yes, I took into consideration that they could probably utilize half of that power, that is, they might possibly increase the power fifty per cent by the use of splash boards. It is a common expedient to use low splash boards.

Q. What is meant in engineering parlance by a dam 60 feet above low water?

A. Well, I take it to mean from low water to the top of the crest of the dam. By the crest of the dam I mean the bottom of the weir, that is, the bottom of the water that runs over the dam, the top of the masonry, or crest of masonry of the spillway.

I am acquainted with the Deschutes River through its extent to Bend, Oregon. Approximately one-third of the flow originates above Bend. My observation as an engineer is, and I think it has been generally conceded that the diversion for irrigation during the spring or early summer months has a tendency to increase the low water flow in the river below the point of diversion. Especially if large storage works should be established on the upper waters of the stream for retaining winter waters to be used in irrigation during the spring and early summer it would increase the low water flow, I should think.

Concerning the market price of power in the city of Portland and in the adjacent country, price of power in

wholesale quantities, I know that when I was vice-president of the Oregon Electric Railroad Company for quite a long time, they paid the Portland Light & Power Company for power for the United Railways and the Oregon Electric a rate which was supposed to figure out the same as the Southern Pacific paid for their power on the Fourth Street line or on the Portland, Eugene & Eastern, which rate I understand was ¾ cents per kilowatt hour, which with 100 per cent load factor would be $49 per horse-power per annum. I think about 60 per cent load factor would be a fair one to figure on, which would come to a rate per horse-power per annum of $29.40.

CROSS EXAMINATION.

In estimating the value of this property of Sherar's, I took into consideration the whole property. I know in a general way the property owned by the Eastern Oregon Land Company.

Q. Did you take into cosideration the north half of the southwest quarter of section 35, township 3 south, range 14 east?

A. No. I took the valuation complete.

Q. Well, did you consider that property in connection with your estimates?

A. Yes, that was part of it, and I also considered the north half of the southwest quarter of section 35, the power house there being part of the scheme of handling the property. I also considered among that property lot

(Testimony of G. A. Kyle)

1, section 3, township 4 south, range 14 east, as part of the property entitled to be considered in arriving at the estimate. Likewise lot 2, section 3, township 4 south, range 14 east, and the northeast quarter of the southeast quarter of section 9, township 4 south, range 14 east.

Q. If it should develop that the Sherar estate and the Eastern Oregon Land Company haven't the right to that property, would your estimate be changed in any regard?

A. Well, it would only be changed in the amount that it would cost to operate a horse-power, that is the comparison of the value of that to the whole cost of the plant.

Q. But if it should develop that the Sherar estate hasn't the right to the damsite, what difference would it make in your estimate?

A. Well, if they have no rights to build there, it would not be of much value. My estimate is based on the fact that the Eastern Oregon Land Company had complete right to construct. I assume that they can condemn the property. They would have to pay whatever it cost to get the property.

Q. Now, if it should also develop that they have no rights up the river south of the south line of the northeast quarter of the southeast quarter of section 9, township 4 south, range 14 east, and could not acquire any, would you consider that their property was made less valuable by reason of the present location of the Deschutes Railroad Company, than if it were 4½ feet higher?

(Testimony of G. A. Kyle)

A. If it is a fact that they have no right to acquire property or condemn it, it wouldn't.

Q. If the complainant in this case has no rights south of the south line of the northeast quarter of the southeast quarter of section 9, township 4 south, range 14 east, and can acquire no rights there above that point, how much less valuable is that property of the Sherar's for power purposes at the present location of the Deschutes Railroad Company, than if that line were 4½ feet higher?

A. If it is a fact that they have no rights, and can acquire no rights up there, it wouldn't affect it.

Q. Now, if it should develop, Mr. Kyle, that the debris which you have referred to, and the location of the toll road which you have referred to, is not on the property of the Sherar estate but is on the railroad property and right of way, what change in your testimony would be made with reference to any damage done by reason of throwing rocks over the side of the embankment at that point, and the change of the road?

A. Well, as I say, my estimate is based on the ultimate cost of the project, and if they should condemn that, it would be the difference in the cost per operating horse-power per year, which wouldn't be very much.

I would consider that they must acquire the right before they could build their power house. That would only affect my estimate as the cost of that right. The ratio of cost of that right would be to the total cost of the power development, which would be rather small, I should think.

(Testimony of G. A. Kyle)

With reference to investigation of power sites within the Portland zone, I have had occasion to look up different power sites, for instance, the White Salmon, the Klickitat, and one or two others. I was chief engineer of the Oregon Trunk during its construction and know that there are other available sites on the Deschutes River. The only difference between the other sites and this one is that I consider this property the cheapest because there is about 34 feet of fall in the river. Your dam does not cost so much to build. That is quite an item. The cost of the dam is really the main item. I should say the main factor in this case is the fall of the river. You don't have to build the full height of the dam. I have only investigated the supply of electricity in Portland at the present time in a general way. I am no expert in that line particularly. I know generally what available supply the Portland Railway Light & Power Company and the Northwestern Electric Company have.

Q. Now, you say there is the additional expense by reason of the extra cost of construction?

A. By that I mean, assuming the railroad as located now, I should say that there would have to be several items of cost there that will have to be taken into consideration. It would be divided up, that is, I would divide it up between the cost to the power construction company and the railroad company.

Q. What are the elements, that is what I am getting at?

A. Well, the elements to the power construction company are first, extra cost of the dam, $7500; extra

cost of building the dam on account of having to blast the rocks above the railroad company's tracks.

Q. Now, Mr. Kyle, if the railroad company were 4½ feet higher than they are today, wouldn't they have that same expense?

A. Yes, if they are 4½ feet higher.

Q. So that element, then, wouldn't come into it by virtue of the difference in elevation, would it?

A. No. It would be the same in one case as in the other.

Q. What other elements, then?

A. Well, building the Grass Valley road, $15,000.

Q. Well, now, that Grass Valley Road, the change which you had in mind was occasioned by the fact that they contemplate putting the power house on the Deschutes side of the river, is that not correct? If the powerhouse were put on the other side of the river, that change would not be necessary, would it?

A. No, not if it were on the other side of the river.

If it should develop that the road at the point where they propose to place their power house is on the right of way of the railroad company, I would not make any difference in my estimate, because I would assume that they would get the right. I would assume that they would acquire the right to build there before they did it.

Q. Now, your testimony with reference to taking into consideration splash boards—in connection with the development of power, what is your idea with reference to splash boards, splash boards on a 60-foot dam or on a dam less than that?

(Testimony of G. A. Kyle)

A. I should think it would not make much difference. You could use splash boards on either dam. It is just as feasible in one case as it is in the other.

Q. And the company could maintain the elevation of the water at 60 feet by the use of splash boards, as well as 62 feet on a two foot higher elevation?

A. Well, I wouldn't say it would be good construction to figure on splash boards over two or three feet high.

Q. Well, they might make their masonry construction at 58 feet and two feet of splash board, that would maintain the water at 60 feet just as well as two foot splash boards on 60-foot masonry.

A. It would not be as practical as if the dam were to be that high. There are a great many objections to splash boards.

Q. I am comparing the two levels. I say, it is as feasible at one elevation as it is at the other.

A. Yes, of course.

Q. Now, on this irrigation diversion storage, while that may increase the low water flow of the river, does it not similarly decrease the flood flow of the river?

A. Well, I should not think it would have a great deal of effect—it would not have nearly as much effect on the flood water as it would on the low water flow. I don't see how it would have very much effect on the flood water. The storage of the flood waters in a reservoir has a tendency, of course, to reduce the high water flow, but not as much, maybe, as the amount that is in that reservoir. All the water that increases the low water

(Testimony of J. R. Thompson)

flow comes from letting out the water in the reservoir during the low water season, and seeping down into the river gradually.

Q. How much construction work in power development have you been interested in?

A. Well, I have been interested in reporting on power systems. I have never had the direct superintendence of construction of power development. I have been around plants a good deal but I have never had the direct superintendence of the construction.

Q. Then your figures are on a theoretical basis?

A. Well, theoretical, and I have had a chance to investigate the workings of different plants as to cost of operations, etc.

J. R. THOMPSON, recalled on behalf of plaintiff, testified on direct examination as follows:

I have made a careful survey from the government corners in the vicinity of the power site and dam site involved in this controversy to determine just where the lines were drawn in relation to these sites on the river. The map now shown to me, bearing my signature, is accurately drawn to show the results of that survey, and correctly delineates the location of the river over the several government subdivisions. The map also shows, based on an actual survey, the contour line of the flow at an elevation of 70 feet above low water in the river, taking the Interior Development dam site location on the west side of the river, on the date October, 1908, for

(Testimony of J. R. Thompson)

low water mark. I was there the 22nd or 23rd, in or along there.

Thereupon said map was offered in evidence by plaintiff and received and marked Plaintiff's Exhibit 39. Said exhibit accompanies this record.

The dam site No. 1 of the J. G. White & Company report is located about five or six hundred feet below the dam site indicated there, which is the Interior Development Company's dam site. The scale of this is 500 feet to the inch. The White dam might cut into the Interior Development Company's land. The dams would be entirely off the Interior Development Company's forties, except the end of the White dam, as I understand it, and would be upon the land alleged to have been scripped by Sherar, and upon which the railroad claims a right of way by virtue of its right of way application.

CROSS EXAMINATION.

Q. I find, Mr. Thompson, when you were on the stand yesterday, I misdescribed the property on which the power plant was located. Will you look at this map and state exactly what Government section it is.

A. It is section 35, township 3 South, range 14 east. It would be the northwest quarter of the southwest quarter.

It is close to the 16th section line between the northeast and northwest quarter of the southwest quarter of section 35. The Oregon Trunk is built on the west side

following the river bank all the way along up to this power house.

PLAINTIFF RESTS.

ST. CLAIR THOMAS, a witness on behalf of the defendant, testified as follows:

I am assistant engineer of the O.-W. R. & N. Company. I have been in the employ of that company for nine years. I was on the construction work of the Deschutes Railroad Company on the Deschutes River. I have prepared a map showing the location and situation of that land with reference to the property here claimed by complainant. The map handed me is the map so prepared. This map is an enlargement from the United States Geological map made for the purpose of showing different contours and bench marks as established by the United States Geological Survey. The first enlargement was a photographic enlargement three times from the original. From that tracings were made; from tracings Van Dyke negatives were made and the common standard white prints, and this is one of the white prints so made. This accurately shows the situation as shown by the Geological Survey. The scale is practically 15 inches to the mile. The center line of the Deschutes Railroad Company is indicated in red on the east bank of the river. The coloring was put on the map from information received from the Legal Department of the O.-W. R. & N. The Oregon Trunk line is indicated in black on the opposite side of the river. The various

(Testimony of St. Clair Thomas)

points along the river upon which are marked numbers with arrows reaching over into the river, such as 675, 677, indicate the elevation of the river bed at that point above sea level according to the United States Geological Survey's standard. The number 715 right at the dam site indicates an elevation of 715 feet above sea level, at the low water stage at that point. That corresponds to the low water elevation as determined by the Deschutes Railroad Company very closely. It corresponds within a couple of tenths of a foot. This map corresponds with the elevation of the Deschutes datum to a small fraction of a foot. The profile on the upper end of the map is a system of several lines, each one of which has a bearing on different things. The lower line—I do not know whether that is the elevation of low water, or the river bed. That line was suggested to me by another party and I put it on there, scaling it from the original map. If I am not mistaken, it is the elevation of low water according to the U. S. G. S. survey. This line is marked A. The next line, B, represents the original location of the Deschutes Railroad Company on what we call in the office the low line. That was the line corresponding to the river grade line and it was located just sufficiently above the bed of the river to make the track safe and get the easiest grade. That was located in September and October, 1908.

The next line, marked C, represents the high line adopted by the railroad company, the line upon which the railroad was constructed. The next line, marked D, represents the elevation of the center line of the Oregon

Trunk Railroad on the west side of the river. The point on the map marked "Dam Site" is a point on the center line of the Deschutes Railroad Company, opposite the development work to date of the dam at that point. That is where the two wing dams are constructed in the river today, and the same location as is represented by the photographs that were introduced in evidence in connection with the deposition of Mr. Nash.

The elevation of the Deschutes Railroad Company's line at that point marked "Dam Site" is shown better in the sketch down in the corner of the map. Its elevation is 779.67 feet. The maximum elevation of the Deschutes line is reached within 300 feet south of that point and the elevation is 781 feet. That is the top of the grade climb at that point. That elevation continues a distance over three miles.

The difference at the dam site between the elevation of the Deschutes Railroad and the Oregon Trunk is 5.67 feet as indicated on the map. The difference in the elevation at the maximum grade point is 4.34 feet. This elevation is the elevation of the top of the sub grade. Between this and the top of the rails there is light ballast and the thickness of the ties and the rail. That will amount to about 1½ foot altogether.

Q. Now, Mr. Thomas, is there anything in this map to indicate where the same point on the profile is with reference to this point on the ground here?

A. Yes, I have indicated that in the same way as I indicated on the profile. For instance, take the dam site,

(Testimony of St. Clair Thomas)

marked up here as the damsite. It is also marked down here as the dam site, so that the point marked "dam site" on the profile corresponds with the point marked dam site on the map, and the point marked "44" on the profile is the same point marked "44" on the map. Likewise, the point marked 45, 46, 47, and 48 correspond with 45, 46, 47 and 48 on the map. Those are mile posts measured from the mouth of the Deschutes River. They are United States Geological Survey mile posts. The point on the map which shows where the line starts to ascend again after reaching this maximum grade is a short distance beyond mile post 47, marked 781. From that point the grade climbs south.

The illustration in the lower left hand corner of the map is a sectional view taken at the point of the Interior Development Company's dam site development work. The points marked "west wing dam" and "east wing dam" represent the approximate position and elevation and length of the two wing walls constructed by the Interior Development Company at the time the measurement was taken. The east wing dam, as I scale it, is about 100 feet long and ten feet deep. The west dam is about 75 feet long and ten feet deep. It varies in depth as you go towards the shore. The exhibit shows the elevation of the water of the Deschutes at the time this section was taken, Augst 31, 1910, and the elevation of the water was 715.3. It also shows the distance between the center lines of the two railroads, which is 551 feet. The jog in the side of the hill on the left represents the reconstructed Shaniko wagon road, as reconstructed by the Deschutes

(Testimony of St. Clair Thomas)

Railroad Company. Its location prior to the reconstruction is not shown graphically on the exhibit. Its location was approximately at the point marked No. 1. The road, prior to its reconstruction, did not maintain any particular elevation. It ran along the bench there and climbed out of the canyon. The line of the Deschutes Railroad Company at that point is not constructed on the old wagon road. In case a water development dam were built to a height of 50 feet or over, that road would have to have been changed.

The illustration just above the cross section is the load curve indicating the daily and seasonable fluctuations of power demand in a typical market. The drawing was put on there by me at the suggestion of our consulting engineer. The larger illustration on the lower right hand corner of the map shown in cross section plat is duration curve of maximum floods of the Deschutes River. That was put on to show the approximate life of a flood, or the number of hours or days that the crest of the flood passed at a certain point. That was put on at the direction of our consulting engineer. The other illustration in the lower right-hand corner is the average mean monthly flow for a period 1897 to 1899, and 1906 to 1912.

Thereupon the map was offered in evidence.

Being interrogated on plaintiff's behalf concerning said map, the witness testified:

I have here the government map from which this map was photographically enlarged. It is the map now pro-

(Testimony of St. Clair Thomas)

duced. There are five things on the enlarged map which have been added and which are not shown on the government map. One is the cross section of the Interior Company's development work to date; another is the load curves indicating the daily and seasonable fluctuations, and power demands of a typical market, the duration curve of maximum floods, the average mean monthly flow for the period 1897 to 1899, and 1906 to 1912; the grade line of the Deschutes Railroad Company, and the grade line of the Oregon Trunk Railroad Company, and also the coloring. The small map does not undertake in any wise to show the subdivision lines of the section. The information for their position was taken from our most authentic maps.

Thereupon the said two maps were received in evidence, the larger map being marked Defendant's Exhibit C, and the smaller map defendant's Exhibit Ca. Said exhibits accompany this record.

The Deschutes Railroad Company had obtained its levels by taking the levels which had been run by the railroad company up the Columbia River to the mouth of the Deschutes and continuing them from that point in the survey.

The witness withdrawn temporarily.

(Testimony of J. P. O'Brien)

J. P. O'BRIEN, a witness on behalf of the defendant, testified as follows:

I am vice president and general manager of the O.-W. R. & N. Company. I have been connected with that company, and its predecessor in interest, in such capacity about nine years, and I have been connected with it in all capacities about twenty years. I am at present connected with the Deschutes Railroad Company as vice-president, and during its construction I was president. I am acquainted with Mr. B. F. Laughlin of The Dalles. I had a conversation with Mr. Laughlin with reference to the location of the Deschutes Railroad line over the property known as the Sherar property along the Deschutes River, early in the spring of 1909 in my office in Portland. That conference was at Mr. Laughlin's instance. Mr. Laughlin called at my office and called on me and said that he was interested with the power proposition at Sherar's Bridge, and he had some interest in the Interior Development Company, I think was the name of the concern, and that he was about to make a trip to San Francisco to take up with some people there that were interested, the question of the consolidation of the several power propositions on the river, and wanting to know particularly whether we had decided on the location of our railroad. The line of railroad had been located at that time. My recollection is, at that time we had several surveys. One was on the grade close to the river, and then there was another, my recollection is 35 or 40 feet above the river. I think we had a survey along about level with the river, just above the river.

(Testimony of J. P. O'Brien)

Q. Now, I wish you would state what, if anything, was said there by Mr. Laughlin to induce you to raise the line of the Deschutes Railroad at that point.

Mr. Veazie: We wish to object, your Honor, to oral evidence of an agreement relating to the granting of any right of way privilege on the land in controversy here, on the ground that they are not competent under the statute of frauds. We would like to have it understood that this objection goes to all the evidence in the case.

The Court: Certainly. You are bringing suit to enjoin these people from occupying that property. I suppose they have a right to show whether they are there by consent or under protest.

Witness: When Mr. Laughlin said to me that he was about to make the trip to San Francisco to take up with other interests there that were interested, the consolidation of these plants, or the consolidation of the different propositions into one company, as I understood it, I asked him if that meant the doing away with one or more of the proposed plants. I told him that we were very much interested in that because we had, as I understood it, the power proposition at Sherar's Bridge, the one he was discussing, then a little further down the canyon there was a government proposition. Then at the mouth of the river there was another proposition known as the Moody proposition; that we were interested in the development of power there; if cheap power was going to help the country, it was going to help us in an indirect

way, and that we were interested in seeing all the interests consolidated, with a view possibly of doing away with one of these plants. In other words, instead of three, if they could be cut down to two, that would be very much—we were interested from the fact that it would cheapen the cost of our line. I also said to him, I hoped in connection with that matter, if anything was done, that the Sherar plant would be the one that was cut out, for the reason that we were in position to lift our line at the Moody proposition at the mouth of the river very much cheaper than we were up above at the Sherar plant, on account of one being in rock and the other a good deal in earth. He asked me how high we could get up in the air at Sherar's. I told him I did not know. That would be a question of cost. As a result of it, I sent for Mr. Boschke, our chief engineer, who has charge of running the lines. I told Mr. Boschke to run a line there and see how far he could get up at Sherar's, without making the cost prohibitive. I asked Mr. Boschke in a general way if he had any idea or if he could get any idea from the data he had in his possession at that time, as to how high he could go without making the cost prohibitive, and he said, in the neighborhood of 58 or 60 feet, along in there. I asked Mr. Laughlin if that would be satisfactory at that height, along in there between 58 and 60 feet. Mr. Laughlin said he thought that would be satisfactory. Of course, any height that we could go above where the line was laid at that time was going to help them out.

(Testimony of J. P. O'Brien)

Q. Was Mr. Laughlin anxious to have you construct your line?

A. Yes, sir. Mr. Laughlin also said that he was very much interested in the transportation facilities up there for the reason that he realized that it was almost impossible, impracticable on account of the expense of getting in materials there, machinery, etc., to put in a power proposition without the railroad on account of the condition of the roads, the difficulty of getting it in.

Q. Did Mr. Laughlin make any representation, or indication to you that if you would construct at the height at which you have indicated, that there would be any charge for right of way?

Mr. Veazie: We object to that, may it please the court, on the same ground as heretofore mentioned, and as leading.

Court: State what he said about it.

A. I asked Mr. Laughlin, when we got along in our discussion of the matter, in a general way, I asked him how about the right of way. And I said we were spending a great deal of money in building the line; that the line was going to overrun badly on account of our not figuring on these different power propositions, and it was of considerable concern to me for the reason that I had recommended the line very strongly to our principals in the east; that I had submitted an estimate covering about what the approximate cost would be, and I knew from the figures that were at hand at that time, that the cost was going to be greatly exceeded, and I

asked how about the question of right of way. He said he did not think there would be any question about the right of way; would be glad to give the right of way free. I asked him then what his connection was with the company that controlled the plant, and he rather evaded that question, but intimated that he, with some people at Salem, had quite an interest in it, and that if the line were built on anything like a reasonable line, there would not be any question as to the right of way, free right of way.

Q. His object was to consolidate all the interests there that were claiming any right in this power development, and to induce you to go as high as you could.

A. That was my understanding. He also had in mind the getting together of the people, as I understood it, that controlled the lower proposition, known as the Moody proposition, at the mouth of the river.

Q. Did Mr. Laughlin ever communicate with you again as to whether or not he succeeded in getting those interests together?

A. Mr. Laughlin wrote me from San Francisco later on, but I am not just positive as to what he said to me. My recollection is that he did not succeed.

Q. Did you in the presence of Mr. Laughlin, at that conference, or at any time, instruct Mr. Boschke to go and construct that line up in the air as high as he could possibly get, and protect the power site at that point, irrespective of expense,

A. I did not. I told Mr. Boschke to run lines there and see how high he could go without the cost being pro-

(Testimony of J. P. O'Brien)

hibitive. Mr. Boschke indicated at that time that the cost would be considerable. He said it was going to cost a great deal of money to get up in the air.

Q. Did you, or did you not, instruct Mr. Boschke that no matter what the cost was, he should get the line up in the air?

A. I did. I said to him that we were interested in the development of cheap power; that anything—while it might cost us considerable money, that any money that was spent might come back to us again.

Q. I don't believe he quite understands the question. I will ask to have it read. (Question read).

A. No, sir, I did not. I thought I answered that a few moments ago. I told him to make survey so as to see how high he could get in the air, how high he could get the line up without the cost being prohibitive.

There was a resurvey made in response to that instruction. That was made shortly afterwards. I instructed Mr. Boschke to take immediate action on the matter.

I could not say as to whether that was the survey on which the line was subsequently constructed. I think it is on the line that was run on my instructions. I think we built on the line that Mr. Boschke ran as a result of my instructions. My recollection is that we spent about $100,000 additional in constructing the line where it is now located, over and above the estimated cost of the line on the river grade. I would not be positive, but that is my recollection. This additional expenditure was made to preserve the power site so they could operate it.

(Testimony of J. P. O'Brien)

Q. And did you advise Mr. Laughlin, or did Mr. Laughlin say to you that he would expect damages for whatever damages you did to him, irrespective of how high you went?

A. He did not.

Q. In Mr. Laughlin's deposition he has testified to the effect that he indicated to you that you should go up in the air, and that you should pay him whatever sum of money you should damage him wherever the line was constructed.

A. He had no such arrangement with me, or had no such talk with me. The question of damage was never touched upon. It was simply a question of how far we could get up in order to give him the additional height, in order to develop his power. It was thoroughly understood that the whole question depended, from my standpoint, on the question of how much money we could afford to spend there, without making the line so expensive that we would have to give it up.

Q. And you did that, did you, to satisfy Mr. Laughlin in connection with your understanding there with him?

A. I suppose that I had. Mr. Laughlin expressed himself as well pleased with what we had done—the instructions that I had issued to Mr. Boschke, and as I said before, when I asked Mr. Boschke about how high he could get, if he could give an opinion as to how high he could go, or how high he thought he could go, on the data at hand, he said between 55 and 60 feet, and Mr. Laughlin seemed to be well pleased with that.

(Testimony of J. P. O'Brien)

I am acquainted with Mr. A. Welch, president of the Interior Development Company. I recall a conference I had with him and one of his partners, Mr. Anderson, at my office. My recollection is it was in the spring or fall of 1909. Let me see just a moment. No, I think it was along in July or August, somewhere along in there, 1909. These gentlemen, Mr. Welch and Mr. Anderson, represented that they were interested in the Interior Development Company. They came over to discuss the same question with me, wanted to know just what our plans were there in connection with where the line was going to be laid. I am not positive whether I sent for Mr. Boschke personally or not, but I sent for the data—sent to his office for the data. I know that I had the data, and pointed out to him what we proposed to do, that we had a line there; that was my recollection of it, that was along in the neighborhood of 60 or 62 feet, somewhere in about 60 feet, and told them that we had gone to a great deal of expense elevating our line, or we would go to a great deal of expense lifting our line to this height, and Mr. Welch said that was entirely satisfactory as far as they were concerned, Mr. Welch and Mr. Anderson. Mr. A. Anderson, I think, was with him. Mr. Welch said he would be very glad to donate the right of way free if I went to that height. I took that matter up with them because I was interested, very much concerned at that time, about the excess cost of the line over and above the original estimate made, and he, with maps before him, showing where the line was

laid, expressed thorough satisfaction. I think these profiles showed the line at its present elevation.

I never had any conversation with Mr. Martin, the president of the Eastern Oregon Land Company, personally, about the Sherar power plant.

CROSS EXAMINATION.

Q. At the Moody power site on the lower river, you raised your line to a height something like 143 feet above high water mark, did you not?

A. We raised it. I couldn't give you the exact data, how high we raised it, but I know we raised it.

If our contract with the Eastern Oregon Land Company called for a raise of that amount, I presume we fulfilled the contract. I haven't the data in front of me and cannot carry them in my mind. I do not know how high we raised our road at the government power site on the Deschutes River between the Sherar site and the Moody site, and couldn't tell you off-hand without looking at the records. When I talked with Laughlin the railroad was already in Grass Valley, 14 miles from the property, that is, the Shaniko Railroad. The railroad company was anxious to preserve the power sites along the river, anything that would furnish cheap power. We hope it may be of value to the railroad company. I was told at that time that the power was to be used for pumping on the arid lands over the river. They were interested in anything to get the lands under cultivation. I was advised that the Government was figuring on it. Mr. Laughlin stated to me that his interest was in the

(Testimony of J. P. O'Brien)

Interior Development Company, and that was the basis on which he was negotiating with me, otherwise I would not have been discussing the matter with him. In that conversation he was speaking of the Interior Development Company's lands. He said the Sherar plant was controlled by the Interior Development Company, and he was in conference with me about the Sherar power proposition. I knew the Interior Development Company had a dam site, or that some company or persons had, on the lands immediately above the falls. I did not know who they were.

Q. It was the result of that conference with Mr. Laughlin and not the result of a later conference with Mr. Welch and Mr. Anderson, which led you to make the survey to lift the road to the height at which it was constructed?

A. The survey I had reference to was the result of the conference with Mr. Laughlin.

Q. And not the result of any conference with Mr. Welch or Mr. Anderson?

A. No, this was later on. I think we had the surveys when these gentlemen called. We had lines anyway. We had something to show the data.

The knowledge I have as to the difference of $100,000 in cost between the construction of the road on the one grade and the other is simply information from our Engineering Department, which is the only way we have of getting such information. It is not a matter within my personal knowledge. All estimates for work of that kind are made by the Engineering Department.

(Testimony of J. P. O'Brien)

The conference with Mr. Laughlin was early in the Spring of 1909. I was under the impression that it was in March or April. I don't think it was later. I think there is on record a letter from Mr. Laughlin to me on this subject, written from San Francisco, and the conference must have been previous to that date. I presume I have the letter in my files.

Q. I wish you would produce that letter for the purpose of fixing the date, Mr. O'Brien.

REDIRECT EXAMINATION.

When was the first you heard of any protest against the construction of the line as located at that point?

A. It was a short time—my recollection is a short time prior to this conference that was asked for by Mr. Laughlin.

Q. That was on the original line?

A. Yes.

Q. But I mean after you relocated your line in the summer—

A. Oh, I don't know. I couldn't say definitely, but it was a long time. I supposed the matter had been disposed of in a satisfactory manner, but it was along a year or more. I think it was quite a while after the line was built, as I recolect it. As a result of these conferences I supposed when we agreed on the line, and after we had had a conference with both Mr. Laughlin and Mr. Welch, and they seemd to be entirely satisfied we would

. . . . .

(Testimony of George W. Boschke)

RECROSS EXAMINATION.

Mr. Welch, as far as I know, has never been connected with the Harriman lines in any capacity. My recollection is that he was connected with the Portland, Eugene & Eastern, but I could not say whether he continued in office after that was taken over by the Harriman system.

GEORGE W. BOSCHKE, a witness on behalf of defendant, testified as follows:

I reside in Portland. I am Chief Engineer of the O.-W. R. & N. Company. Have been connected with that organization since April, 1905. I am Chief Engineer of the Deschutes Railroad Company and have been such chief engineer since its organization in 1906. The location and construction of the line of that road was under my management.

I heard the testimony of Mr. O'Brien who preceded me, and recall the conversation which he referred to between himself, Mr. Laughlin, and myself. I cannot say exactly what time it took place. It was in the early part of 1909. I think there are some records probably that could be traced, because I immediately afterwards sent a man out to make a reconnaisance. I was called down to the conference by Mr. O'Brien to see what we could do about raising the grade there. The line was located at that time on the water grade line along the river. That location had been made some time in 1908.

(Testimony of George W. Boschke)

Q. And what was said, if anything, at that conference with reference to changing the grade?

A. Well, they wanted us to change the grade so as to enable them to build a power site at that point, Sherar's Bridge, and Mr. Laughlin said that anything we could raise the grade there would be of great assistance to him. I had not at that time definite data as to the exact height to which the grade could be raised.

Q. Did you indicate or had you any information by which you gave any information as to what you thought you could do.

A. Well, I had the length of the line from the tunnel to the dam site, and our maximum grade was eight-tenths, and from that I formed an approximate idea of how much I could get up, but that was nothing definite at all.

Q. Did you indicate approximately what that would be?

A. Well, I think I said something between 45 and 50 feet—perhaps 60; I don't know. We were not definite at all. I saw it was possible to get up on our maximum grade, because the low line grade was much lighter.

The tunnel is about 3.2 miles from the dam site. The elevation of the line at the tunnel is 661, and the elevation at the dam site is 781. That isn't right at the dam site but 781 is the profile grade at the level where we run levels parallel with the water that would be restrained by the dam. I indicated approximately what elevation we could make at the dam site, at that conference. I

(Testimony of George W. Boschke)

knew that we could get up some number of feet and Laughlin said anything we could get up there would be very desirable. I don't remember exactly the height I thought we could make. It was 45 or 50 feet, perhaps 60. I don't remember, but the whole thing hinged on starting up on a maximum grade and getting as high as we could. That is what my instructions were to do.

Q. Did Mr. Laughlin express satisfaction or dissatisfaction with the approximate height which you indicated?

A. Well, as I said, at this conference he said that anything that we could get up there would be very desirable and agreeable to them; whatever we could do would be appreciated.

Q. Mr. Laughlin has testified in his deposition that at that conference Mr. O'Brien instructed you to raise that line sufficiently high so as not to interfere with the power development at the Sherar or Interior Development site, irrespective of cost. What is your recollection with reference to that?

A. No, I did not get any instructions at that conference to do anything more than to investigate it.

I sent a man out to make a reconnaisance and he made a report on the approximate cost of carrying it out, and after I got that report, I sent out a location party to make the actual survey. Plaintiff's Exhibit 31, which I have just been examining, is the profile of the line that was run, the high line, and is the profile of the line as constructed. There was incurred, in round numbers, One hundred thousand dollars additional expense

in constructing the line on the elevation on which it was constructed, over and above the estimated cost of the line as originally located. Approximately $20,000 was expended by the Railroad Company in changing the wagon road in the vicinity of Sherar Bridge.

I saw more or less of Mr. Whistler along the river there. He called on my office for information as to the height of the line, etc. He, as I understood it, was representing Mr. Martin's interests. In calling at my office, he wanted maps and profiles of the railroad located line. I furnished these to him in October, I think it was October, the latter part of October, 1909. The profile referred to by Mr. Whistler in his letter of October 6, 1909, to Balfour, Guthrie & Company, as having been furnished by my office, is a profile of the line for several miles on each side of the dam, and showed the location of the line as indicated on Plaintiff's Exhibit 31. I offered to give Mr. Whistler all the information I had, as indicated in his letter to Balfour, Guthrie & Company. With reference to the statement in Mr. Whistler's letter to Balfour Guthrie, that the profile did not show the elevation above water surface of river, I should think it would be a very proper thing for him to go there. He had where our line was. It was staked out on the ground, and he could find the river there.

Q. When you said you thought it was about 70 feet, did you purport to give him any accurate information?

A. No, sir.

Q. Did you advise him that you had any such information?

(Testimony of George W. Boschke)

A. No, I don't recall that, because we didn't take—in running our survey, we didn't take the bed of the river, you know. We had a high water and low water on the low line, and it could have been arrived at. He had ample information. By going on the ground, he could very readily determine.

Q. Did you attempt to deceive him?

A. None whatever, no, sir.

Q. And you had furnished this profile, you think, prior to October 6, 1909?

A. Well, he was in the office off and on all along. I think that he had the profile. I think when we were discussing the lower dam site, he wanted another copy, and I gave him quite a liberal piece of it, showing a good deal of the line where he really wasn't interested, and a map also.

The file book shows the record of blue prints made and to whom delivered; kept by a file clerk in the drafting room, under my direction. This book shows a map and profile of the Deschutes Railroad from mile post 36 to 52 was furnished to Whistler at 8:30 in the morning of October 29, 1909. Mile posts 36 to 52 cover the line through the Sherar property. The new line was run prior to September, 1909, because we were building it in September. We commenced construction through the Sherar property on this .8 grade in August, 1909. I don't know approximately how many men were employed on this work but it was quite a force. I should judge there would be fully one hundred. We had a great many men on the construction of that line. They

(Testimony of George W. Boschke)

were scattered all along the canyon; anywhere from two to five thousand. We were constructing between mile post 43 and mile post 48 or 49 in August, September, October, November and December, 1909, and January, 1910. In February, 1910, we were still working on some of the heavier parts of it. I think that about covers the months we were working there. The grade was practically completed the latter part of February, 1910. The rails had not been laid at that time or the bridge constructed. We built the bridges as we came up to them with the track. We didn't haul any bridge material ahead.

Q. How soon was it, Mr. Boschke, that an examination of the grounds would disclose the grade at which the line was to be constructed?

A. Well, the grading at Mile Post 44, 1000 feet in there, was about completed in August, 1909, and right at the dam site the grade was completed—well, I don't say was completed, but it was laid out there so you could see where the grade was in October and November, 1909.

That was right practically at the dam site; either side of that; in fact, the grade all along there was marked out so you could readily see at what height the grade would be.

Q. What, if any steps, Mr. Boschke, were taken by any one to stop the work of construction?

A. None whatever. I thought it was all settled. I got busy completing the railroad. I had an order to build it on the high line.

Q. Do you recall when it was you first heard of any protest against the construction of the line there?

(Testimony of George W. Boschke)

A. Oh, I think the line was all done before I heard any protest. I don't—I think it was quite a while afterwards. I don't recall anybody making protest at all, until after the line was all built.

Q. Did Mr. Whistler ever make any objection to you that your line wasn't high enough for the purposes for which his client wanted to use the property there?

A. He spoke of the upper end, the way our grade lay, where the water came down, coming down the natural grade of the river, would reach the water backed up from the dam; it would probably flood our grade in there. I said to him, that part of it, we would readily change that when the time came; when he had a dam there, but I did not believe in spending any money to change that at this time.

He made no protest whatever as to the height at which our line was above the dam in that vicinity. He never attempted to stop us from going ahead, or tried to induce us to change our grade there. He never, other than that which I have just mentioned, indicated any dissatisfaction on the part of himself or the people whom he represented.

Mile post 44, to which I just referred, is 3000 feet south of the dam site as indicated on Defendant's Exhibit C.

CROSS EXAMINATION.

When I had this interview with Mr. Laughlin, I think Mr. Morrow was present and Mr. O'Brien. It was some time the early part of 1909. I don't recall

that Mr. Laughlin told me anything about what his interests were, but I assume that he had some from the way he talked. In fact, he talked as though he had a very large interest in it. He wanted the line raised, he said, so that they could build a power site at that point. He said nothing about the height to which he wished us to raise our road, except that I said we could go up on our maximum grade, and whatever that would take us up. He said that would be very satisfactory to him. All that Mr. O'Brien told me was to send a man out and see what could be done; make a reconnaisance first, which I did.

Q. You made an affidavit once in this case, didn't you?

A. I think so, yes.

Q. I will read from it; you can follow it if you wish: "Said B. F. Laughlin was negotiating at said time with the Deschutes Railroad Company, to induce the said Deschutes Railroad Company to raise its line of railway where same should run to such an extent as to permit the construction of a dam at said dam site, 60 feet in height above low water flow of said Deschutes River." Now, your recollection is now, you didn't say anything like that?

A. I said we would raise it, as I said before—we could probably get up from 45 to 60 feet.

Q. That was not what he was asking you to do then?

A. He said he would be very glad of any height we could get up.

Q. Now, in your affidavit you say, "Said negotia-

(Testimony of George W. Boschke)

tions were had, and said request was made of said Laughlin." You don't remember that he made that request "must go up 60 feet high?"

A. Well, it was understood that we could go from 45 to 50 or 60 feet; something of that kind. I never saw him afterwards.

Q. Now, did you agree at that time that you would go up that high?

A. No, sir, we did not. We agreed to see what we could go up; we would go up whatever our maximum grade would allow us to go up.

Q. Did you ever have any interview with Mr. Laughlin except that one time?

A. I never saw him that I remember of.

Q. What did he say about the height to which the road should be raised, which would be satisfactory to him?

A. He said whatever we could get up there would be satisfactory to him.

Q. Now, in this affidavit you say that he said, "That if the height of the line of the Deschutes Railroad Company were raised to the height of 60 feet, or raised to a height to permit of a 60 foot dam at this dam site, it would be satisfactory?"

A. Well, I think he did say that after I said we could probably get up a certain height. He may have said 60 feet, or 55 or 60 feet, whatever we could get up on the maximum grade would be very satisfactory to him.

Q. In your affidavit you said he said that if you

would go up 60 feet, to build a 60 foot dam, it would be satisfactory, didn't you?

A. Yes, I think very likely it was a fact.

Q. So he really did say to you, if you would go up to such an elevation as to permit the building of a 60 foot dam at this dam site, it would be satisfactory to him?

A. Well, possibly he did, but I couldn't tell him at that day that Mr. Laughlin was making this arrangement at all.

Q. That is what he said would be satisfactory?

A. I expect he did.

Q. He didn't say anything else was satisfactory?

A. Yes, he did. He said any height would be satisfactory that we could get up to.

Q. In your affidavit, you didn't say any height, did you?

A. No, I didn't say that possibly, in there, but that was the fact, just the same.

Q. What, if anything, did you say about the right of way over the land?

A. Well, my understanding was, if we went to this large expenditure, that the right of way, that wasn't to be considered at all; practically be given us, or a nominal sum, or something of that kind.

Q. That was based on your going up high enough for the building of a dam 60 feet in height, wasn't it?

A. That was the assumption on our raising the grade as high as we could raise it, not to exceed our maximum grade.

(Testimony of George W. Boschke)

We afterwards made a resurvey of the line across that point. We had no surveys at the time of this conference except the one on the lower line on the east side of the river. At the time of this talk with Mr. Laughlin we were moving camps in all along the line and getting ready to start work. I don't know whether we had begun to work at that time. I think probably we had down at Deschutes Junction, or any points where we weren't having to bother with these dam sites. The tunnel was not built at that time. I think they had possibly opened up some work near the tunnel. I don't think, though, we had started work on the tunnel itself. The new survey was made through there during March, 1909, and the conversation with Mr. Laughlin was prior to that. It may have been several weeks ahead of that. The first month that any work was done was August, 1909. The difficulty about beginning the increase of grade further down the river was that at the east end of tunnel No. 2 there were very abrupt cliffs and tunnel and all that sort of thing. The grade for several miles below this tunnel was light—about three or four tenths, for a distance of eight or ten miles. There wasn't any particular difficulty about raising the grade from a point ten miles below the tunnel all the way to the dam site, if you wanted to spend money enough. It would have made more difficult construction. If you were running a line along the river bank and should put it up on a slope of basalt cliff, it would make very much difference in the construction.

Q. What was the object of changing your grade?

(Testimony of George W. Boschke)

A. Well, to get up at Sherar's Bridge to where we did get it.

Q. To what height was it your purpose to go?

A. To a height as far as we could go, beginning at the tunnel, and going south on our maximum .8 grade.

We kept that .8 grade up all the way from the tunnel to the dam site. The .8 grade begins at the east end of the tunnel. The other figure I gave you, 661, was the west end of the tunnel. The east end is 667, and we climbed to 781.

Q. Now, Mr. Boschke, if you had kept that .8 grade from the east end of the tunnel to the dam site, you would have climbed up over 130 feet, wouldn't you?

A. Yes, if we didn't compensate for the curves. You can't go right through a curve, you know, on a maximum grade.

Q. Then you didn't climb actually up the .8 grade?

A. I climbed on what is known as maximum .8 grade; all that we could climb with the alignment; that had to be the grade laid on. The tunnel is approximately 1200 feet long.

Q. What was the object in making this climb, of climbing up on this .8 grade?

A. To give them as much room as we could for the dam site there.

Our purpose was to put our road at such an elevation as to allow Mr. Laughlin to build as high a dam as possible. It is pretty hard to say where the dam site is. Where "The Interior Dam Site" is written on here, the elevation is 779.6. At a point a couple of hundred feet

(Testimony of George W. Boschke)

above, it is 781. Going south for several miles, it is level, until we reach the grade of the river again—from mile post 43 and two or three tenths, to mile post 46½ about.

Q. How high a dam did you calculate could be built at the dam site without interfering with your road?

A. I wasn't making any figures on the dam site at all, or the dam. I was building a railroad there, and building it as high as I could get up, starting at eight-tenths grade at the tunnel.

I think a dam readily could be built there 60 feet or over without flooding our track or right of way so as to interfere with our railroad, if the flood waters were properly taken care of.

Q. Why weren't you building your road so as to guard against flood waters?

A. As I said before, my object was to build a railroad there, and I was ordered to build it as high as I could, going up the maximum grade from the tunnel, and there wasn't any dam built there at that time, and there isn't today. In my opinion, though, a dam could be built there 60 feet, and probably would be all right, except might flood our slopes, and in that way soften them up and injure the railroad, where the slopes run down into the river.

When I gave Mr. Whistler the profile, which seemingly was on the 29th of October, I may have discussed the height at which the grade was being constructed, and I may have informed Mr. Whistler that the road was being constructed at a height sufficient to permit the construction of a dam at the dam site of the In-

terior Development Company, 60 feet in height. I must have done it if it is in that affidavit; I probably did.

Q. In your affidavit you say this: "On October 29, 1909, I delivered to Mr. John T. Whistler maps and profile of the line of the said Deschutes Railroad Company as amended, to comply with the undertaking and agreement had with said B. F. Laughlin, and showing the elevation at which said line was then being constructed, and work on it had been prosecuted for approximately two months, and discussed with said John T. Whistler the height at which said grade was being constructed, and informed the said Whistler that the same was of a height sufficient to permit the construction of a dam at the site known as the Interior Development dam site above referred to, of 60 feet in height."

A. Well, I think that is right too.

Q. You did do that?

A. Yes, I think it can, and I don't think that will hurt our line in there, not on any land that is owned except by ourselves; there is some fills on some lands owned there by ourselves, that the water would back up badly.

Q. Did you, in considering the line built on the land owned by yourselves, have any thought of that dam site?

A. Oh, I couldn't change the grade of that line to miss some particular piece of property. If you have ever seen the Deschutes Canyon, the cuts and fills there, you can't adjust a line so as to keep out of the way. We built what we considered a safe railroad.

(Testimony of George W. Boschke)

Q. Now, in that affidavit, you spoke of an agreement which you had with Mr. Laughlin. What agreement are you referring to?

A. Well, this conversation that we had with him, we agreed to go up to the height that we finally did go up to.

Q. Now, do I understand you that there is a part of your line above this dam site which would be flooded if a dam was built at that point, 60 feet in height?

A. I think so. I think I looked along—I can't say just where it is, but these fills run down to the river in many places. For instance, at mile post 45, a fill runs down below the grade line—five, ten, fifteen, twenty, twenty-five—twenty-five feet on the center line, and possibly more out on the slope and at mile post 45¼ it runs down about twenty-three feet.

Q. I call your attention, Mr. Boschke, to your affidavit again. In your affidavit you say this: "That the elevation of water by a 60 foot dam at the site of the Interior Development Company above referred to, will raise and back the water upon the land of said Deschutes Railroad Company, in said Section 9, but the said Deschutes Railroad Company has raised the grade of its line at said point to such a height as to permit of the construction of the said 60 foot dam, but if a dam higher than said 60 feet shall be constructed at the said dam site, the water of the Deschutes River will be forced back, and over the grade and line of the said Deschutes Railroad Company in said Section 9." So that from this affidavit it appears that if a dam were con-

structed there at only 60 feet in height, it wouldn't affect your railroad at that point at all.

A. If it were what?

Q. If the dam were constructed at the dam site only 60 feet in height, you have so built your railroad it would not affect your railroad at that place?

A. No. I think it could be built there and protected, inasmuch as we would have to do more riprapping at those places, I mean.

Q. In your affidavit you say a dam can be built there 50 feet in height, without affecting your railroad?

A. Of course it can. That is only a nominal expense, a few thousand dollars to riprap those banks and make them safe, but we certainly wouldn't be spending that money now until there is a dam there to spend it for.

Q. Then I understand, Mr. Boschke, that in your judgment, a dam can be built at the dam site 60 feet in height, and it wouldn't affect your railroad as now constructed at all?

A. I think so.

We had only one survey at the time of the conference with Mr. Laughlin—only one located line. We may have had some preliminaries. There was nothing said at the conference between me and Mr. Whistler in regard to the elevation of our road at the dam site. We do not reach our maximum height until we get two or three hundred feet south of the dam site.

Q. Then how did you expect to protect your railroad at the dam site?

(Testimony of George W. Boschke)

A. Well, I don't—levees or something of that kind. I think there are some cuts in there; build a retaining wall or something like that. It is only a matter of a couple of feet there. It wouldn't be a hard job to keep out two feet of water. I don't recall that being discussed with Mr. Whistler. He had all the information. He had where our line was to be, and the bottom of the river was there on the ground, and he could easily tell what relation they bore to each other.

REDIRECT EXAMINATION.

I am not a hydraulic engineer. I built the railroad. I don't know anything about building a dam, but in my opinion such a dam could be built, and flood waters could be taken care of in a spillway or something of that sort.

During all this time we were prosecuting efforts with the government to secure right of way over public lands of the United States. We filed maps and there was a great deal of difficulty in getting them approved. We were after the right of way matter constantly. That was done by Mr. Morrow, and I think he will testify that I kept at it hard enough trying to get it, because we had very large forces and were anxious to get the right of way to go ahead and build it.

RECROSS EXAMINATION.

The department did not act on our maps and kept delaying acting on them; also exacted some stipulations

in regard to protecting water powers at the government damsite. They wanted us to sign a stipulation, if we built on the low line, that we would raise the grade whenever they got ready to build the plant, to an elevation of about 100 feet, to permit the building of a 100 foot dam. We used a gradient of eight-tenths to get up there.

J. W. MORROW, a witness on behalf of defendant, testified as follows:

I am Tax and Right of Way Agent for the O.-W. R. & N. Company and the Deschutes line. I have occupied that position nine or ten years. I was in charge of acquiring the right of way of the Deschutes Railroad along the Deschutes River. I was present at a conference between Mr. Laughlin and Mr. O'Brien in February, 1909. It took place in Mr. O'Brien's office. It came about, as far as I know, Mr. Laughlin called upon Mr. O'Brien, and Mr. O'Brien called me to the conference, and I presume called Mr. Boschke as well. Mr. Laughlin was interested in having us elevate the grade of the Deschutes Railroad as far as possible and something was said to Mr. Boschke as to what elevation we could get there, or what elevation we could reach, and I got the impression and understood then that Mr. Boschke said we could reach an elevation of 60 feet, and with that elevation Mr. Laughlin was entirely satisfied. In fact, in the course of the conference, he said that any elevation we could get above the present line would

(Testimony of J. W. Morrow)

be very satisfactory and agreeable, but that the elevation of 60 feet would be entirely satisfactory.

Q. What, if anything, was said by Mr. Laughlin with reference to giving the railroad company right of way free if the line should be built at that elevation?

Mr. Veazie: At this time we renew our objection to that evidence on the ground that it is incompetent under the statute of frauds.

The Court: Very well.

A. There never was any question about giving us the right of way; the right of way up the line over all these power sites, which was a negligible quantity. They were always ready and quite willing to give us a right of way provided we would construct the line, and that was so indicated by Mr. Laughlin at that conference.

Mr. Boschke was instructed by Mr. O'Brien to determine what grade he could reach. Mr. O'Brien did not tell Mr. Boschke to raise the grade to the highest possible point, irrespective of expense, but Mr. Boschke was instructed to raise the grade—see to what height he could reasonably elevate the road.

I am acquainted with Mr. Monroe Grimes. Mr. Grimes was one of the executors of the Sherar Estate and was also the husband of the adopted daughter of Mr. Sherar. He seemed to have the actual management of the property as far as the Sherar estate was concerned. There were two executors, Mr. Grimes and Mr. Holmes, but Mr. Grimes was in actual charge of

the property. I had a conference with Mr. Grimes with reference to acquiring the right to go upon this property. I think this was on the 9th of August, 1909, at The Dalles.

Q. And what took place at that time?

Mr. Veazie: We renew the same objection.

A. We discussed the rights of way through the Sherar estate property. Mr. Grimes said that so far as he was personally concerned, he would be very glad to donate the right of way. That the value of the property—its principal value was as a power location, and that by the construction of the line of railroad, it would enable them to develop the power plant—a power plant; that without it, it would be practically impossible to do so. He said, however, that in view of the fact that there were other heirs to the estate, and that they were widely separated, some of them being represented by an agent in Kansas through power of attorney, others in Manitoba through power of attorney, and he, and I think Mr. Holmes combined, held power of attorney for part of them, and that he wouldn't—couldn't reasonably satisfy the heirs without some compensation, and we agreed that a thousand dollars should be paid for the right of way. And when that agreement was reached with Mr. Grimes, we immediately went to his attorney's office; Mr. Grimes reiterated our agreement in Mr. Huntington's presence, and at that time there was an understanding had—that is, I was led to believe, in fact, I was told that some parties had an option on the property, and an understanding was had that in case the sale was made, then

(Testimony of J. W. Morrow)

I should have to deal, or I must deal with the purchaser, but in the absence of sale being made, that both Mr. Grimes and Mr. Huntington would exert every effort in their power to assist me in securing as early a settlement of the question as possible; that is, as early a consummation of the deal, and at the same time give me permission to go upon the land and construct the line.

Mr. Veazie: May it please the Court, we move to strike out that testimony on the ground of the objection already given, and on the further ground that the agreement testified to is one beyond the scope of the powers of executors, in general or under the will that is in evidence here, showing the scope of these powers; that any authority that might exist as attorney in fact, to agree to such a matter, for any of the heirs would have to be shown by a writing; and on the further ground also that the agreement was on a condition which it appears was afterwards fulfilled; that is, that the property was sold to others which rendered void any agreement which may have been made, by its terms.

The Court: Very well.

This conference was had, first with Mr. Grimes some place at The Dalles, and as I say to you, we immediately went from that conference to Mr. Huntington's office at The Dalles, and at that place, as I have related, we just simply repeated the conference which took place in the presence of Grimes and myself.

Mr. Wilson, Mr. Huntington's partner, was in the office, and at that conference, and with that understand-

ing, it was agreed that the elevation of the line should be such that a dam 60 feet in height above low water mark should be constructed. I, undoubtedly, had my profile with me at that time. I cannot recall exactly, but in all probability I did. I wouldn't go to solicit the purchase of a piece of right of way without the profile and map showing the location of the property; that is, it is not customary to do it, and I presume that I had it. I am satisfied that conference was on the 9th of August, 1909. This date is fixed in my mind because of a communication I sent to Mr. Grimes, asking him to meet me at that time. This meeting was practically by appointment. It was the purpose of our meeting, in fact, my notice to him was that I wanted to discuss the right of way matter through the Sherar estate. I subsequently received a communication from Mr. Huntington.

I was in the court room when Mr. Huntington was on the stand in this case.

Q. There was introduced, in connection with Mr. Huntington's testimony, the original letter from him to you, in which he referred to the understanding had between you. Did you ever make a reply to Mr. Huntington?

A. Yes, sir. I did.

I now produce a copy of the letter that was received from Mr. Huntington, dated August 25th, and it refers to a telephone conversation, in a general way, had that afternoon. I replied to that letter. My reply, I think, was on the 26th of August.

(Testimony of J. W. Morrow)

In the conference between Mr. Huntington, Mr. Grimes, and myself, I was advised that there was an outstanding option on the Sherar property; that is, I didn't understand whether it was an option or not, but a possibility of selling it; probability of selling it as well. I was not informed who owned the option.

Q. When did you first learn as to who the intended purchaser was?

A. I happened to meet with Mr. Martin on the train coming in from Salem and there learned that he, or his company, was the prospective purchaser.

Q. And what, if anything, took place in that conference or that conversation?

Mr. Veazie: We renew our same objection to that testimony.

A. We went into the matter pretty thoroughly; in fact, I think I broached this subject to Mr. Martin, and it developed that he was the prospective purchaser; and I outlined to him the agreement that I had reached with the Sherar estate representatives, and that agreement was entirely satisfactory to him. He said that we could go on and build the line, and, as a matter of fact, when the thousand dollar consideration was mentioned, Mr. Martin wasn't at all interested in that feature of it. I said to him, "I have agreed to pay the Sherar estate a thousand dollars, and I will do the same thing by you."

To that Mr. Martin simply said that it was satisfactory. He was perfectly satisfied to have us go on and construct our line, and he was willing to carry out

the agreement that I had had with the Sherar estate people. After the conference with Mr. Martin, I notified the Chief Engineer, Mr. Boschke. I also notified Mr. Huntington that I had seen Mr. Martin, and that he had expressed his willingness. That is all in the letter which you have referred to before. The Deschutes Railroad Company is ready and willing to pay to the complainant in this case One Thousand Dollars as a consideration for this right of way. After my understanding with Mr. Martin, that they were the prospective purchasers, I think for two or three times subsequently I would meet Mr. Martin and ask him if the deal had been consummated, and when I finally understood it was consummated, I prepared a deed for the right of way over the Sherar estate property, to be executed by and on behalf of the Eastern Oregon Land Company.

Q. Mr. Morrow, did Mr. Martin ever object to you—to the construction of the railroad through the property in question?

A. I think along late after the construction was made, there was some question raised then about the line, but not prior to the time—not to my understanding along the times that the line was constructed, and I don't believe until after it was completed, although I am not aware of the date when it was completed.

Mr. McKenzie never communicated with me, or made any protest, nor the Sherars nor anyone connected with the Sherar estate ever protested against the construction, nor did anyone connected either with the Sherar

(Testimony of J. W. Morrow)

Estate or the Interior Development Company or any one person claiming any interest in the property. I never had any objection from any source. I took it for granted that the agreement that I had with these gentlemen was entirely satisfactory, and I rested on that. Subsequently, at the time, of course, when this question was raised, naturally I heard something about it, but I don't know from what source now.

Q. When was it that the question was raised?

A. Oh, it was along in 1910, not before 1910 some time, and I think in the early part of the year; I should say just about March.

I am acquainted with Mr. Welch. I conferred with him about the right of way over this property some time along in the summer of 1909. I was not present at the conference between Mr. Welch and Mr. O'Brien. Mr. Welch was president of the Interior Development Company. The Interior Development Company then had their property in compromise between them and the Sherar estate. They had at least some claim there and I went to see Mr. Welch about it and he agreed that we could go on the property and construct the line, and that a dam should be built there at an elevation of 60 feet. I think that I prepared a deed as well for execution on the part of the Interior Development Company.

The negotiations with Mr. Welch were entirely pleasant and I heard nothing from it after that except that he was satisfied. I heard Mr. Welch's testimony on the stand yesterday, and his conference with me was

in conformity with his testimony as to his understanding with Mr. O'Brien.

I am acquainted with Mr. McCornack of Salem. I had an interview with him with reference to that matter and he was satisfied with whatever Mr. Welch did.

MR. B. S. HUNTINGTON, recalled by defendant, testified as follows:

Q. Mr. Huntington, when you were on the stand the other day, you identified a letter which you wrote to Mr. Morrow, dated August 25, 1909, which was introduced in this case as an exhibit. Did you ever receive a reply from Mr. Morrow to that letter?

A. I think I did.

Q. Have you that reply with you?

A. I have not. I have looked for it but have been unable to find it. Part of our files are in The Dalles and part are here.

Q. I will hand you a carbon copy of the letter and ask you if that is a copy of the letter which you received in reply to your letter of August 25, 1909.

A. I think it is, for I find in a letter that I wrote on the 27th a quotation from this letter, and I think this is the one.

Mr. Wilson: I will offer that in evidence.

The exhibit was marked Defendant's Exhibit Q. It reads:

(Testimony of B. S. Huntington)

"Huntington & Wilson, Attorneys at Law, The Dalles, Oregon. Gentlemen: This will acknowledge receipt of your letter under date of August 25th confirming our conference and understanding over the contention with reference to the construction of our line through the Sherar's estate property, for which I thank you very much. And at the same time I am pleased to advise that I talked this matter over with Mr. Martin of the Eastern Oregon Land Company, who has expressed a willingness to have us go upon the land to construct our line.

Very truly yours."

This carbon is not signed, but it is "Tax and Right of Way Agent."

Q. Now, Mr. Huntington, did you communicate the information contained in this letter to the Eastern Oregon Land Company, or to its agent, Balfour, Guthrie & Company?

A. I wrote a letter to Balfour, Guthrie on the 27th of August, of which I have a letter press copy here.

Upon waiver of production of the original by the counsel for complainant, the letter was read into the record, as follows:

A. This letter was written at The Dalles, but the letter press copy does not show the name of the place of writing. "August 27, 1909. Messrs. Balfour, Guthrie & Company, Portland, Oregon. Gentlemen: In re Sherar lands. We are in receipt of yours of the 27th and note your suggestions with respect to rights

of way. The assent of the representatives of the Sherar heirs to the crossing of the lands is conditioned entirely upon their obtaining the assent of the Eastern Oregon Land Company or whatever person or company is the proposed purchaser under the Laughlin option. We have a letter from Mr. Morrow, dated yesterday, in which he states that he has seen Mr. Martin and obtained his consent that the Deschutes Company proceed to build across the lands. He said, 'I am pleased to advise that I talked this matter over with Mr. Martin, of the Eastern Oregon Land Company, who has expressed a willingness to have us go upon the land to construct our line.' The representatives of the heirs are fully aware that they have no right at this time to consent to anything with respect to a right of way only as it meets your entire approval. If you or Mr. Martin have not given consent to their proceeding with the construction of their road, it is obvious his, Morrow's, mind should be disabused of an apparent impression he has received from the conversation with Mr. Martin. In our telephone talk and in our letter confirming the same, we conditioned the assent of the heirs upon their obtaining the assent of the persons who have agreed to purchase the property, and Mr. Morrow must understand that we are not in any way consenting to any act which is not entirely assented to by you. No negotiations have been opened with the Oregon Trunk line as yet. We have advised their right of way agent that a sale of the property is about to be consummated and that we cannot grant any right of way only as it is done with

(Testimony of B. S. Huntington)

the consent and approval of the purchasers. No payment will be accepted from either company for a right of way until it is determined whether or not this sale is to be consummated.

Yours very truly,
Huntington & Wilson."

Questions by Mr. Minor:

Q. Mr. Morrow has said he had a conversation with you and Mr. Grimes in his office the 9th of August.

A. I was not in The Dalles on the 9th of August. I was away from there from the 6th until the 10th.

In answer to questions by Mr. Wilson, he testified:

I was in Portland. I am not positive as to what day of the week the tenth was, but I think it was Tuesday. My family was living here in Portland at that time, and from a memorandum made by me at the time, I find I left The Dalles on the 6th and returned there on the 10th. I do not now recall any conversation had at any other time during the month of August, around that time, with Mr. Morrow and Mr. Grimes. Mr. Morrow tried to refresh my memory as to conversations, and I would not say that I did not have them, but I have no recollection now.

Q. Mr. Grimes, in his testimony as a witness for the complainant, testified that he and Mr. Morrow went to your office and had an understanding or conversation sometime along at that time. Do you recall when that was?

(Testimony of J. W. Morrow)

A. I do not remember of Mr. Grimes and Mr. Morrow and myself ever having any understanding about this. I have reason to believe that Mr. Morrow and Mr. Grimes had some understanding, but I would not swear that such conversation did not take place in my office.

J. W. MORROW, recalled as witness on behalf of the defendant, testified as follows:

I had a conversation with Mr. B. F. Laughlin in regard to the right of way through the Sherar property, subsequently to the meeting in Mr. O'Brien's office in February or March, 1909. I find in my files a statement concerning the meeting that I had with him prior to July 14, 1909, and I have good reason to believe that it was just about that date, 1909. Mr. Laughlin told me at that time that Mr. Anderson of Tacoma, whose deposition in this case I have read, had an option on the property from him. It was Mr. Anderson who was interested generally with Mr. Welch, and he, Laughlin, told me that that option expired on July 14th; that if it were not taken up, we would have no difficulty.

Objected to as incompetent evidence of any rights under that option, or its expiration, or anything of that sort.

He, Laughlin, stated that if the option were not taken up, we would have no trouble in reaching an understanding with them.

(Testimony of J. W. Morrow)

I have just heard the testimony of Mr. Huntington with reference to the date of the conversation occurring in his office. I think my testimony was to the effect that I thought it was on August 9th, and that was predicated on the fact that August 7th I addressed a letter to Mr. Grimes asking him to meet me at The Dalles on Monday. August 7th was Saturday. The following Monday would be the 9th and I assumed that that was the day I did meet him. That was what fixed the date in my mind.

CROSS EXAMINATION.

The first talk in Mr. O'Brien's office with Mr. Laughlin was long prior to the conversation which I testified to yesterday. As to what date I do not know, but it was in the early negotiations of our activities on the Deschutes River. Mr. Laughlin was in Mr. O'Brien's office when I called upon Mr. O'Brien and he was simply saying to him, in a general way, that he had an option on some property up there, and they were talking it over, and I don't think that I opened my mouth during the conference. Then it was in February of 1909 the conversation which I testified to yesterday. I had two talks with Mr. Laughlin in Mr. O'Brien's office. I think no one was present at the first conversation except Mr. O'Brien, Mr. Laughlin, and myself. I don't think Mr. Boschke was present. At that time nothing was said except that Mr. Laughlin had an option, and that was about all there was to the conversation. It was prior to the first of the year and I

am not sure but what it was in the early part of 1908 and possibly in 1907. The other conversation took place in February, 1909, when Mr. O'Brien, Mr. Boschke, Mr. Laughlin, and myself were present; no one else that I can recall. What was said was that in a general way Mr. Laughlin was saying that he was then intending to go to San Francisco for the purpose of negotiating with other interested parties in the development of the power on the river, with an object of consolidating the various interests, and avoiding the construction of the dam site or power plant at the mouth of the stream, but at Sherar's instead. He was wanting to know about the elevation there, and really expressed himself as being satisfied, or that he would be satisfied with any elevation that we might reach. There was more or less discussion and Mr. Boschke referred to his profile; and my understanding is—and I think it is true—that he said he could probably reach an elevation of 60 feet. Anyway, whatever that elevation was, Mr. Laughlin expressed himself as being perfectly satisfied with it.

Q. You made an affidavit in this case, did you not?

A. Yes, I did.

Q. And in the affidavit which you made in this case, you referred to this conversation between yourself, Mr. O'Brien, and Mr. Laughlin, did you not?

A. Well, I don't recall, Mr. Minor. If you will read the affidavit, the affidavit speaks for itself. It is a long time since that affidavit was made.

Q. Well, I will read this affiadvit: "That in the

(Testimony of J. W. Morrow)

presence of J. P. O'Brien, G. W. Boschke, B. F. McLaughlin" (That is the way it is here) "and myself, the said B. F. Laughlin, representing himself as being in possession of an option to purchase the Sherar Estate property, when a general discussion was had with reference to the construction of a line of railroad over the same, said Laughlin urged that the road should be built at as high an elevation as possible; in fact, stating to the remaining three, who were representing the railroad interests, that if they would go as high with the grade as they could, they would be satisfied; when the chief engineer, by reference to his profile and maps, stated that it was possible to reach a height so that a dam sixty feet in height could be constructed, and this was agreed upon the part of Mr. Laughlin to be sufficient." Do you remember making an affidavit to that effect?

A. If those are the words of the affidavit, and I have no reason to doubt them, I made it.

Q. Then in that conversation it was agreed that the elevation should be sufficient to allow of building a sixty-foot dam?

A. Well, I don't think so, Mr. Minor. Now, I will tell you about that sixty-foot dam. I am satisfied that Mr. Boschke said that he could reach an elevation—if not positively—I think positively of 60 feet. That is the way I have it in my mind. And the dam site or the dam—I think that I reached that conclusion subsequently, and after the survey was made, and had an understanding that it was possible to construct a dam at the height of 60 feet; but at the conference that I

am testifying concerning, I don't believe that that was true. If my affidavit says so, I believe it is erroneous to that extent.

Q. You may read your affidavit and see whether it doesn't say so.

A. Oh, I don't question your word for it, Mr. Minor. I don't question your reading of the affidavit.

Q. Then your affidavit, wherein you state that Laughlin agreed that an elevation which would admit of the building of a 60-foot dam was sufficient, is erroneous in that particular, you think?

A. Well, Mr. Laughlin was satisfied with the discussion had at that time, and, as I say, I am myself satisfied that Mr. Boschke said that he could reach an elevation of 60 feet; and Mr. Laughlin was satisfied with whatever the discussion was. I know that perfectly.

Q. Well, do you remember whether the question of the height of the dam was discussed or not?

A. Well, I don't. My recollection of it is just as I have stated it to you.

Q. This affidavit gave your recollection at the time it was made, didn't it?

A. Why, yes. Yes, unless—Well, I am sorry that is there, of course, but the phraseology I must have not noticed specially at the time, Mr. Minor.

Q. This affidavit purports to have been made on the 30th day of April, 1910.

A. Yes.

Q. That is about the time it was made, isn't it?

(Testimony of J. W. Morrow)

A. Oh, yes, whenever it is dated there, it was made at that time.

Q. Well, now, do you think that your recollection now is better than your recollection was at that time?

A. No, I do not think that it is.

Q. So you think your recollection at that time was more apt to be right than your recollection now?

A. Not necessarily more apt to, but equally as reliable at that time as it is now.

In the interview between me and Mr. Grimes, when we went to Mr. Huntington's office, he reiterated the statement to Mr. Huntington which he had made to me, and it was understood then that we could go ahead and construct our line. I think that I negotiated with these people upon the theory that the elevation to which the road should be built was sufficient to admit of the construction of a 60-foot dam.

Q. Now, Mr. Morrow, in this affidavit you say: "We then agreed upon a consideration of $1,000 to be paid for the right of way through the said Sherar Estate property; and the further agreement and understanding was had that the line of railroad should be built at such a height as to permit of the construction of a sixty-foot dam."

A. I think that is right.

Q. You think that is right?

A. I think that is right.

Q. Mr. Grimes insisted and you agreed that the railroad should be built at such an elevation as to admit of the construction of a 60-foot dam?

(Testimony of J. W. Morrow)

A. No, Mr. Grimes never insisted upon any particular height at all; nor did Mr. Huntington. It was simply my statement to them that we could do that, to which they offered no objection, but were satisfied with it.

Q. But it was agreed that the railroad should be built at an elevation to admit of the building of a 60-foot dam?

A. I negotiated with them, as I believe, with that understanding.

In connection with my conversation with Mr. Laughlin, he always said he would be glad to donate the right of way, there is no question about that. I don't recall that he said that in his conversation in July. I think my conversation with Mr. Welch was subsequent to August. I submitted to him the maps and profiles and I presume I said to him—I have no doubt I did say to him, "I notice that you have an interest in some property up here, and I am negotiating for the rights of way over these lands." I wanted to know what position he would take in connection with the right of way, and he very agreeably said he would be glad to give us the right of way—no compensation for that; the only thing is that he wanted protection for his power plant. I think I told him that we could build a line there 60 feet, or build a line there that would permit of a 60-foot dam.

Q. So that, in your conversation with Mr. Welch, you represented that the railroad would be put at such an elevation as to admit of the building of a 60-foot dam?

(Testimony of J. W. Morrow)

A. I think I did, yes.

Q. And that is what he said he would be satisfied with?

A. Yes, he must have said he would be satisfied with it, because he said he was satisfied that we go ahead and commence the construction of our line.

Q. But the representation you made was that the line would be built at an elevation to admit of the building of a 60-foot dam?

A. Yes, I think that is right.

In all our negotiations with any parties interested in that property, the principal point of contention was the height of the dam; the power sites were always interested, in avoiding the possibility of interfering with the construction of the dam, and in all these negotiations, the height was always at a 60-foot level above the low water flow of the Deschutes River according to my understanding of it, and I think that is right.

Q. In other words, in all your conversations with all these parties, they all insisted that you should build your railroad to such a height as to permit of building a 60-foot dam?

A. No, they never insisted. They never insisted. The fact of the business is there wasn't such a great amount of obligation put upon this dam site. I gathered the information after the line was surveyed that we could build—that we would build at an elevation admitting of the construction of a dam at that height; and I think it was entirely my suggestion to these people,

to which they never offered any objection. I don't think the height of the dam was seriously discussed.

Q. Now, I call your attention to your affidavit, in which I find this language: "That in the negotiations with each and all, the principal point of contention was the height of a dam, and this height was always at a 60-foot level above the low water flow of the Deschutes River."

A. Yes, sir.

Q. That is correct, is it?

A. I admit that this is—as I have said, I think that was the basis of my negotiations.

I first met Mr. Martin very early in the activities on the Deschutes line. I had negotiations with Mr. Martin for the line down at the mouth of the stream. It is difficult to fix the dates because our preliminaries range from 1906 until we completed the line. The negotiations I had with Mr. Martin were entirely in regard to crossing the lands of the Eastern Oregon Land Company down toward the mouth of the Deschutes River and had nothing to do with the Sherar property. The first talk about the Sherar property was on August 24th, 1909, on a trip from Salem to Portland on the train. This was the first and only time I ever opened negotiations with him in regard to the right of way over the Sherar property. The conversation opened up in a general way and during the progress of it I perhaps asked—I wouldn't be surprised but what I asked Mr. Martin directly if he were not the proposed purchaser of the Sherar Estate property. Anyway,

(Testimony of J. W. Morrow)

learning that he was, I reiterated to him the statement of agreement that I had with the Sherar Estate representatives, to which he consented, and seemed perfectly satisfied with. There was some conversation concerning the cash consideration, and that was an entirely negligible quantity with Mr. Martin. I am inclined to think that he rather objected to taking any money. I said to him that I had agreed with the Sherar Estate to pay that sum; there was no reason why I should not pay it to him, and that I would pay it to him. Anyway, he was perfectly satisfied and said we might go along in the construction of our line. I told him that I had met Mr. Huntington and Mr. Grimes and had agreed to give One Thousand Dollars for the right of way and had their permission to go on with the construction of the line—enter upon the lands and construct the line. While I do not recall it, I must have told him about what had occurred between me and Mr. Grimes about the elevation at which the railroad was to be built. I don't recall positively the conversation that I might have had with him concerning the height of the dam, and I really don't recall that it was raised at all; but in all probability, when I stated to him the understanding I had with the Sherar people, I also included the fact that we were building at an elevation to admit of the construction of this dam.

Q. 60-foot dam?

A. Yes, I possibly did.

I have an idea that I told Mr. Martin that also. The only writing I ever had with reference to the right

of way over the Sherar property, was the letter from Mr. Huntington which has been placed in evidence and which I replied to. I do not recall that I had, and I don't believe I had any correspondence in writing of any kind, or any negotiations in writing of any kind with either Mr. Laughlin or Mr. Martin, or the Eastern Oregon Land Company, or Welch, or Anderson, or the Interior Development Company, or Grimes, or any party representing the Sherar interests.

REDIRECT EXAMINATION.

The reason I didn't get any writing or deed from the Sherar heirs at that time was because I could not conclude negotiations with them. As I have said, they were negotiating for the sale of the property; but I was assured by both Mr. Grimes and Mr. Huntington that, in the event the sale was not made, each of them would exert himself to the utmost to secure as early a settlement as it was possible to have of the matter. I mean to secure the early execution of the deed. In all these negotiations and conversations with these people I think I had my map and profiles with me, but I won't say now each time that I might have met them, and as far as Mr. Martin is concerned, I never had it. I never showed him the profile and map, because my conversation with him was on the train and I didn't have it with me, and I was not out at that time for the purpose of buying rights of way. To Mr. Huntington and Mr. Grimes I undoubtedly did exhibit profile and map. That was undoubtedly a copy of the profile introduced

(Testimony of J. W. Morrow)

in evidence here, showing the present location. With Mr. Welch I showed the map and profile and they expressed satisfaction with the location; no objection was made to it, and no objection was made that they couldn't build a dam 60 feet high after the location of the line at that point.

RECROSS EXAMINATION.

Q. But you told them all, as I understand you, Mr. Morrow, that the profile did show that you could build a dam there 60 feet high?

A. No, I didn't tell them that the profile would so show. As I have said, I am satisfied that I negotiated with them upon the basis that the elevation of our track was such as to admit of the construction of a dam. And yet even that, there is some question in my own mind about, for the simple reason of some memorandums that I find in my file, for instance, in writing a letter to Mr. Cotton, where I have said—

Q. Never mind. I object to what you said to Mr. Cotton about it. In your affidavit, Mr. Morrow, you state this, speaking of your interview with Mr. Welch: "In my negotiations with Mr. Welch of the Interior Development Company, I presented to him a map and profile, showing the new or higher grade of the line proposed to be constructed, which grade admitted of the construction of a dam sixty feet in height."

A. Well, sir, I showed him the profile, and if the profile does do that, that is all there is to it.

(Testimony of A. L. Veazie)

Q. If the profile which is now in evidence does not admit of the building of a dam sixty feet in height, then that is not the profile that you showed him, is it?

A. Oh, yes. Oh, yes, same profile—same profile. My construction must not be taken literally when I say that it admits of the construction of a dam 60 feet in height. That is my conclusion of it—the general understanding that I had, that it was high enough to admit of it.

A. L. VEAZIE, called as a witness on behalf of defendant, testified as follows:

I am the A. L. Veazie that filed Santa Fe scrip on the North Half of the Southwest Quarter of Section 35, and Lot 2 of Section 3, Township 4 South, Range 14 East. I made that filing for the benefit of the Interior Development Company, and I represented the Interior Development Company in the prosection of that claim. I made an examination of the records of the local land office at the time I made that filing, to determine whether or not there were any entries on that land at the time the filing was made. As a result of that examination, I made the filing. I found no subsisting entry. I found there had been an old entry which was cancelled at that time. That was on the 26th of January, 1906, but in some way there was a mistake in the date of the filing. You will find sometimes in the papers it was stated that the filing was made on the 26th and sometimes on the 27th.

(Testimony of A. L. Veazie)

Thereupon, by permission of counsel for both parties, it was agreed that the township plat, covering township 4 South, Range 14 East, was filed in the local land office at The Dalles on December 17, 1880, and that the plat of Township 3 South, Range 14 East, was filed on May 15, 1881.

CROSS EXAMINATION.

The fact was brought out on my direct examination that I made the filing for the Interior Development Company on the 26th of January, 1906, upon those lands. A filing was made by Mr. Sherar on the same lands on the 13th of February, 1906, and a contest ensued. A decision was rendered by the Secretary of the Interior on the 15th or 16th of June, certified copy of which has been introduced here, awarding priority to the Sherar filing on both tracts, and the lands ultimately passed to patent under that ruling.

REDIRECT EXAMINATION.

I represented the Interior Development Company in that contest until the parties came to the settlement of it. The decision was on the ground that Sherar was an occupant of the land, and that therefore the lands were not vacant public lands open to selection under the act of 1897. It was not determined under what law Mr. Sherar was an occupant of the land. It was not necessary that he should occupy it under any particular law. Mr. Sherar had been the owner by assignment of

(Testimony of W. E. Coman)

a contract with the state of Oregon. The state of Oregon some years previously, I think about the year 1902—I am not certain as to the precise date; the evidence is in from the land office—had applied for these lands as lieu lands, and the certificate had been purchased by Mr. Sherar. He asserted to be an occupant under his supposed contract rights with the state. The state selection was cancelled on the 26th of January, 1906, officially on the land office records. The instructions to cancel it had been in the land office there, it seems, for some days. It became effective on that date. Mr. Sherar asserted that he had been occupying as a purchaser from the state, and asserted the right to put in other base when that was cancelled, an equitable right which was recognized.

W. E. COMAN, a witness on behalf of defendant, testified as follows:

I am vice-president and general manager of the Northwestern Electric Company of Portland, which is engaged in the furnishing of electric light and power principally in the city of Portland from a hydro-electric power development on the White Salmon River.

This construction was completed about a year ago to a distance of about 70 miles from Portland. The capacity of the plant is about 22,000 horse power, as now developed. There is opportunity for further development on the river above the present plant, which is controlled by our company. At the present we have

(Testimony of W. E. Coman)

considerable surplus power available, because we are just entering the city of Portland. I should say offhand we have twelve to fourteen thousand horse power surplus today. I do not know whether my company investigated the power possibilities at the Sherar Bridge site before constructing on the White Salmon, or not. I understand our people looked over the Deschutes River and other rivers throughout the Northwest in a general way.

Q. Now, an estimate has been made here and admitted, in a general way, of the cost of bringing power from the Sherar's Bridge site referred to, on the Deschutes River, to the City of Portland, that the same does not embrace or contemplate any investment or expenditure of work within the City of Portland, in reaching customers or consumers. I will ask you what the fact is as to whether, in coming into a market like this, any very substantial investment is involved and necessary in bringing the power within the city and to the consumer?

A. Within the city?

Q. Yes.

A. Yes, a considerable investment.

The cost of bringing the power within the city and to the consumer is an important factor in the unit cost. The extent of this depends upon the amount generated, of course, but with our company, the expense of entering the city for distribution of light and power is a considerable item and we are not through with it yet by a long ways. In certain portions of the principal business dis-

trict on the West side of the river, the construction required must be underground, which is handled by conduits. Our company is now installing these and has installed several miles of it.

In case the plaintiff, or any other power company, should come to the city, but not within the city, with a large supply of power, from thirty to forty thousand horse power, our company would not be in the market for such power as we have our own to sell, and I do not know of any other company that would be in the market for that power to distribute. There is plenty of power available here at the present time with the two companies in the field. There is competition and plenty of power. I only know of the surplus power of the Portland Railway, Light & Power Company from general information. I understand, in a general way, they have somewhere from twenty to thirty thousand horse power surplus at the present time. We are not permitted to operate in the city without a franchise. Our franchise carries a provision that three per cent of the gross earnings must be paid to the city, and we have to have distributing facilities in the city, after we bring the power down from the power site. This distributing system involves a considerable item of expense to us. We bring our power into the city at sixty thousand volts and we have a substation on the east side of the river where it comes at this voltage, and there it is stepped down for distribution through the city; and then we have to have another station on the West Side of the city for transforming to direct current, and for distribution on the

(Testimony of W. E. Coman)

West Side of the city. We have considerable of a conduit system on the East Side in bringing the cables from the sub-station across from our station to the river bank —that is all underground—to cross the river by cable. We consider it the only practical way of handling the situation. I could not give in figures an estimate of the percentage of the cost of facilities investment, equipment, in handling the distributing system within the city, as compared with the initial investment, or with the actual investment at the power site, for the reason that we are in the midst of our work of installing our facilities, but we have gone far enough to see that it is going to be a big item with us, and I would not be surprised if our expense and our facilities in the city here would probably equal the expense of building the plant on the river, although we have put in part of our underground system steam heating conduits, which have added some to the expense. Our dam is 125 feet high. It is of re-inforced concrete and masonry construction. Our flume is a little over a mile. It is wooden stave pipe flume from the dam to the power house. Our power house is a concrete building.

CROSS EXAMINATION.

Our expense, as it stands today, for installing the plant on the ground out there at the power site, is easily somewhere in the neighborhood of two million dollars, which does not include the transmission line or the distributing system in the city of Portland. We have a head of 176 feet there. We are selling most of

the power we are delivering now before it gets into the city distributing system—we are selling about 4500 horse power independent of it, which we are able to wholesale without putting it into the city distributing system. That is practically all to one plant. I do not mean to argue from the situation her that it was a foolish thing for our company to undertake to enter this market with twenty thousand additional horse power when it began its project. Actual construction work was begun about two years ago. I look for a considerable increase in the use of electric power in the city of Portland. I think manufacturing will increase in the city, and there is other business generally. I should say the use has more than doubled in the past ten years. I know it has increased very much and that the increase has been very rapid. The distribution system is intended to enable us to reach all portions of the city and the small consumers. We get a great deal higher rate from the small consumer than if we were simply selling what might be called wholesale. We serve no electric railways. Residence lighting would probably be five times as much as would be charged an electric railroad that took a large quantity. The lighting of residences is the highest rate. With other consumers, power consumers, there is a considerable difference in the rate; the power rate is lower. By this distribution system we reach the small consumers throughout the city and get the advantage of the much higher rate that they pay. Of course, the investment to serve those small consumers is considerably higher. We are not finding it a hard field to enter. I

(Testimony of St. Clair Thomas)

think the opportunity here for our company is good, because prior to the entrance of our company, there was no competition here. While general business is rather quiet now—there is not much increase, and has not been for some little time, in the use of electric power —we all have faith in the future, and think things will grow better, and that there will be an increase in the business.

In addition to the power above testified to, our company has installed in the basement of the Pittock Block a steam auxiliary plant, which will, of course, increase the amount of our capacity. That is to take care of emergencies. It is designed primarily as an emergency plant in case of any trouble with our hydro plant.

REDIRECT EXAMINATION.

There are no considerable number of plants, tributary to our line, outside of the city that will consume this power that is developed, and I should say there are no plants to any extent tributary to any of the other lines.

ST. CLAIR THOMAS, recalled as a witness on behalf of defendant, testified:

The distance between the center line of the constructed line and the center line of the located line as shown on the filing map filed with the United States, where the same runs through the North Half of the Southwest Quarter of Section 35, Township 3 South,

(Testimony of St. Clair Thomas)

Range 14 East, varies somewhat. Along the west end of this section, the distance between the constructed line and the line as originally run, is approximately one hundred feet. 200 feet east of that it is sixty feet. About half way or about the middle of the north half of the southwest quarter of section 35, it is 70 feet. At the east side of the north half of the southwest quarter, it is 170 feet. With the exception of a very small piece, the line as constructed is entirely within one hundred feet of the line as shown on the filing map. The scale of this map is 400 feet to the inch. The change in the center line was necessitated to afford the necessary grade climb south, to provide an elevation over the point of the Interior Development Company's dam-site. In lots 1 and 2, section 3, township 4 south, range 14 east, the distance between the center lines is about 30 feet. It does not exceed, at any point, 60 feet in those lots, so that the line as constructed through those lots, is entirely within the limits of the right of way map filed with the United States. In the southeast quarter of the southeast quarter of section 9, the distance between the center lines is approximately 40 feet. In the southwest quarter of the southeast quarter of section 9 it is approximately 20 feet. In the southwest quarter of the southwest quarter of section 9, it varies between approximately 40 feet and approximately 15 feet. In the northeast quarter of 17 the lines join, and they do not diverge from there on.

The map with reference to which this testimony was

(Testimony of St. Clair Thomas)

offered, was received in evidence and marked Exhibit R, and accompanies this record.

On this exhibit the located line filed with the government is the one nearer the river. The constructed line is the one further from the river. This map accurately represents the located line in connection with the constructed line. The constructed line is colored red and the other yellow.

I have here a map showing the location of the toll road referred to in my testimony. The original road leading from Sherar Bridge to Grass Valley, is shown by a single dotted line between 34 and 35. This coming up over the hill to a point west of the center line of the quarter line of 35, indicated by the arrow point, was necessarily changed. The present location of the wagon road is shown by the double line throughout, connecting with the road leading to Sherar Bridge. In addition to that, the wagon road leading to Shaniko from the bridge was changed, and the abandoned line, or the original line, is shown in a single dotted line starting from Sherar Bridge across the river, coming up here to the right and intersecting at a point up about the center of section three. That was reconstructed, and the reconstruction is shown by the double line, climbing instead of going to the right; after we cross the bridge, going to the left, and climbing around over the Deschutes Railroad, thence around on the side of the hill, and intersecting the original road at the point indicated there.

The power site is not shown on this map. I here mark the sixteenth section line in the north half of the south-

west quarter of section 35 with yellow pencil. At that point, and immediately west thereof, the distance from this road as reconstructed, to the center line of the railroad is about 20 feet, right at the sixteenth section line. About 200 or 250 feet west of that it is about ten feet. That road does not at any point within the northwest quarter of the southwest quarter Section 35, exceed one hundred feet from the constructed road. The wagon road as constructed was at this point practically on the center line of the railroad as surveyed and filed.

I was employed on the Deschutes River during location and construction, although not at this point. I was, at frequent intervals past, and I am, familiar with the dam site known as the Interior dam site, and I was frequently in that neighborhood during construction and location.

Q. Did you ever observe any work on a dam, or an alleged dam, at that point?

A. I observed it each time I was down there.

The greatest number of men that I saw employed there at any one time was four. They were excavating loose material from the Oregon Trunk side and the Deschutes River side, and wheeling it out in wheelbarrows and dumping it in place.

Q. Were they prosecuting that work with vigor, as though they had a purpose in view?

A. It didn't appeal to me in that way at all.

Q. Did they seem to have any head to the work directing?

A. They evidently had directions, but at the same

(Testimony of St. Clair Thomas)

time they were not doing the work in a very vigorous manner.

Q. What did they do that you observed that led you to that conclusion?

A. That which led me to that conclusion was one time when I was down there making survey of this particular part of the road, I paid particular attention to see what they were doing, and it was amusing to see the way they were prosecuting their work; at least, it appealed that way to me. Instead of working along as though they were doing it on what we would call a force account basis, they would take a shovelful of stones, probably two or three out of the excavated material on the side, and while they had them in that long shovel, they would toss them in the air and see how many times they could whirl around their shovel before they came down; they would endeavor to catch all those they tossed in the air. They didn't seem to be working with any particular purpose as far as I could see.

CROSS EXAMINATION.

The center line of our railroad as delineated on the map—Defendant's Exhibit R—appears to follow almost precisely the line of the wagon road as delineated thereon for the distance from Sherar's Bridge to the point where the road turned southward to go up the canyon at station 2271-542, and the road would have had to be built somewhere else, or at least it would have had to be changed in some respects if the railroad had been built on the line of the original survey. In making that

change, it would have been necessary to have put the road east of the railroad track, so that some such relocation of the roadway as we did make for our more elevated line would have been necessary for the other line as well. It is evident from the map also that the road to Grass Valley from a point marked station 2171-116 to station 2160-247 followed almost exactly the center line of the railroad as now constructed. I can only argue so from the relative positions of those two roads on the map. I was not down there during location or construction. I am producing this map for the guidance of the court, on the supposition, however, that it is correct.

The map, identified by the witness, was offered in evidence as defendant's exhibit S, and accompanies this record.

The railroad throughout the distance as to which I have just testified, where it occupies the old Grass Valley road, is on a grade on the side hill and the road itself was on a grade on a side hill before its reconstruction, and not on the flat, but on the same grade that the railroad now occupies. It did run on the flat for a considerable distance but there was a little hill that it climbed over and it was around that hill that we made the change. When I refer to the map filed and to the location as designated thereon, I mean the one that was filed on November 8, 1908.

The roadbed has settled to some extent since these profile elevations were taken. My work was done up there shortly after the time they finished construction.

(Testimony of St. Clair Thomas)

It had not settled to any appreciable extent at that time.

Q. But it has settled since?

A. I cannot testify as to that because I have made no examination to that effect.

Q. As a matter of fact, from your experience, you would expect it to settle, would you not?

A. Yes, I would expect it to settle some at fills.

That is on what is considered high hill construction, the excavation makes an embankment. It is about half fills and half cuts. It would not sink in the cuts unless the amount of sub-grade, what we call sub-grade excavation, the back filling caused by the sub-grade excavation, was of such material as would cause its settling. Usually, and through those cuts in particular, the back-filling is made of the excavated material, which is solid rock; there is no settling. I took measurements on the Deschutes to determine at that point the height of our road above low water. One is shown on the large map which is an exhibit. Those elevations were taken by me on August 31, 1910, and by the assistant engineer in charge of that piece of work April 3, 1910. Those are the only measurements that were taken that I know of during the time of construction. So far as our records show, these are the first that were taken for this particular location. There is a foot difference in the water levels between April 3rd and August 31st. We could have arrived at the same elevation as the Oregon Trunk by continuing our grade further south on the eight-tenths rise an approximate distance of 542 feet to over-

come the elevation of 4.34 feet which is the difference between the two level grades. At that time, if we should have gone that additional grade-climb, the element of cost would have been considerably greater on account of the details of construction. We would have to throw into the hill farther in order to keep our work lighter further ahead, and at that particular point the work is rather heavy. It is solid rock excavation through this particular point at the dam site and would necessitate a larger amount of solid rock excavation, which runs into considerable money, and that is a detail, as I understand, that was one of the governing features of this proposition. We supported on a bluff going around there at approximately the top of the bluff, and from there up the hill the slope was very steep, and if the proposition should have been to have gone to an added height over that which we did at the time, the excavation, while it would have been a considerable bit larger, probably it would have numbered into a small number of thousand dollars additional cost for making that climb.

REDIRECT EXAMINATION.

When the low water elevation of the river was taken, it was approximately low water, that is, 715.3. After reconstruction of the roads, they were of a more substantial character.

(Testimony of J. P. O'Brien)

J. P. O'BRIEN, recalled as a witness on behalf of the defendant, testified as follows:

I have examined my files to determine the date of the letter from Mr. Laughlin to me in the early part of January, 1909. The letter is dated at San Francisco on March 3rd, and received by me approximately on the 5th. The conference which I had with Mr. Laughlin was prior to that time. The Deschutes Railroad Company is able to pay the one thousand dollars for right of way through the Sherar property. The line of that company is approximately one hundred miles. It cost approximately five million dollars, between four and one-half and five million. The matter of payment to these complainants was in the hands of the right of way agent. I have examined my files to determine, if possible, the date when I was first notified of any protest from the Eastern Oregon Land Company, or any dissatisfaction.

Q. Did you ever receive any such protest, or notice or dissatisfaction with the understanding you understood existed?

A. Not direct from any of the owners of the property.

Q. Now, you testified yesterday that the first you heard of it was approximately a year after a certain time. What was the time you had in mind that determined that year afterwards?

A. I think I stated that it was about a year after I had my conference with Mr. Laughlin. That was the meaning I intended to convey.

(Testimony of J. P. O'Brien)

CROSS EXAMINATION.

The letter to which I have referred is the letter of March 3rd, 1909.

Upon consent of defendant, said letter was read into the record and is as follows:

"San Francisco, March 3, 1909.

"Mr. J. P. O'Brien,
V. P. & G. M. O. R. & N. Co.,
Wells Fargo Building, Portland, Oregon.

Dear Sir:

We have been in conference for several days, and the different parties in interest now have the matter of the consolidation of the various interests on the Deschutes River under consideration, and it looks very much to me now at the present time that this consolidation would be brought about some time during this month, probably about the middle of the month. I am going to remain in California until after the 15th instant, and if you still wish the right of way up the Deschutes, kindly communicate with me, and I will place such matter before my associates at the earliest opportunity. Kindly address me care of Brown-Walter-Simmons Company, 615 Crocker Building, San Francisco, California.

Yours very truly,

B. F. Laughlin."

(Testimony of O. B. Coldwell)

REDIRECT EXAMINATION.

Q. Did you answer that letter, Mr. O'Brien?

A. I did not.

Q. What did you do with reference to it?

A. The matter was then in the hands of Mr. Morrow, our right of way agent, and I think he was advised to that effect, and all further proceedings in the matter were had with Mr. Morrow.

RECROSS EXAMINATION.

After I received the letter I never took the matter up with Mr. Laughlin at all, nor do I know, personally, of any conference having been had with him after that time.

O. B. COLDWELL, called as a witness on behalf of defendant, testified as follows:

I am general superintendent of the Portland Railway, Light & Power Company of this city. I have been connected with that company and its predecessors off and on for the last twenty years. It is engaged in furnishing of light and power in this territory. The company has a combination of water power and steam power plant to supply this community, principally water power. About 90 per cent of the generation is by water; the remainder by steam. These water power plants are located on the Clackamas and Sandy Rivers; also on the Willamette River at Oregon City. Steam

plants are used to supplement the water power plants the reason for that being that there is apt to be interruptions from time to time in transmission lines; therefore steam plant is deemed to be necessary to supplement the water power. Our practice is to operate the steam plants regularly in order to give the guaranty of continuity of service, although they do not carry full load at all times. They are under steam, and the attendants are there, and everything ready to take care of emergencies. In fact, they float in, as we term it, on the system, in order to be prepared.

The aggregate capacity of our plants is around 90,000 horsepower; about 60,000 kilowatts. The principal market we serve is right here in Portland. We also serve the outlying districts, Salem and Vancouver, the Willamette Valley between here and Salem to a certain extent; also the railway systems—Oregon Electric, United Railways, and that part of the Southern Pacific system, now called the Portland, Eugene & Eastern, which has been electrified. The plant at Oregon City, the Willamette Falls property, is approximately 6,000 kilowatts; 6,000 to 6,500 kilowatts, about 9,000 horsepower. Our other plants consist of two plants on the Clackamas and one on the Sandy River. The Clackamas plants together approximate 25,000 kilowatts—24,000 to 25,000—and that on the Sandy River about 10,000 kilowatts.

Q. What are the market conditions here for power, as to whether the condition, I mean, is over-developed, or under-developed, or is there any demand for power?

(Testimony of O. B. Coldwell)

A. Well, starting in about 1905, we had a very rapid development of this whole territory, as is well known, not only from the standpoint of light and power, but other standpoints as well. Our growth was rather rapid for a period of years, up to about 1910, or thereabouts, and since then it has dropped off quite materially; the result being that contemplated developments, or developments, rather, that we were working on in anticipation of meeting the demand about this time, have been completed, and we haven't a load on the developments that we thought we had a right to expect. In other words, we missed our calculations somewhat, as others have in other lines, and have more development on hand right now than there is load for. It is a little difficult matter to say offhand just how much surplus power we are carrying right now, but I should say that we could readily carry 20,000 to 25,000 kilowatts extra load right now if it were offered. That would be about 30,000 or 35,000 horsepower.

Q. Well, is there any market for the consumption of that power in this part of the country, outside of the city?

A. It is not very apparent, and we have scoured the country pretty well in that respect. As you know, there is competition here to help us get any load that there is, that is, help share it with us. I cannot speak very encouragingly on the matter of increased load.

Q. Is the condition such that within any reasonable time the development of a power plant on the Deschutes River, at an expenditure of upwards of three million

dollars, would be warranted at this time, for entering this field in competition, a 40,000 horsepower plant?

A. Well, on the assumption that a plant would be developed only if there were load in sight for it, I do not see where there would be any particular justification at the present time. However, there may be loads of other kinds that might be developed. For instance, there has been spoken of the question of manufacture of nitrates, and reduction of iron ores, new industries entirely, which are unknown practically to this section of the country at the present time. I will just explain that we have ample power for the present needs of the community, and quite an excess. I have spoken about thirty or more thousand horsepower excess which we have already developed, waiting for load, and we have other possibilities for putting in more units. Under those conditions, I would say, unless it is a matter of competition, or coming in on some basis other than what I can see, there would be no particularly good prospect for load for a new plant. With respect to the possible further development of our own facilities, we have, for instance, in our Cazadero, or in our Clackamas River plants, in one of them room for two additional units. We have plans for possible storage facilities on the head waters of the Clackamas River which can be put in and made available for the production of more power at certain times of the year when the water is low. At the Bull Run plant there is also opportunity to put in one more unit in the same plant, without doing anything further in the hydraulic end outside of the extension of pen-

(Testimony of O. B. Coldwell)

stocks. These additional units would develop approximately 15,000 horsepower. With reference to peak load of our present facilities, we had peak-load last winter, on the one hour basis of reckoning, of 45,000 kilowatts. That would be approximately 60,000 horsepower. The expenditures involved or necessary in the field of consumption in the way of conduits, pole lines, organization, transmission, and local plants generally, for business, in the case of water power plants, is a very important factor. The cost of step-up and step-down transformers, the buildings to hold your transmission lines, and final distributing systems in a city, total up a figure that would be comparable with the cost of developing the water power itself. In the city of Portland there is an ordinance requiring underground construction in a certain area, bounded in general by Jefferson street on the south, Union Depot on the north, the river on the east, and probably 12th or 14th street on the west. In that district the poles and overhead lines have all been removed, and conduits substituted in their place. It is my offhand recollection that the underground system in the streets alone, irrespective of sub-station apparatus, etc., cost us well over $900,000. The sub-station apparatus is in many instances expensive. It depends largely upon the type of apparatus, but for general light and power work, such as we carry on here, sub-stations are expensive. The apparatus in sub-stations usually consists of transformers, motor, generators, rotary converters, or other electrical apparatus of that kind, all of which is expensive machinery, the cost depending upon the appa-

(Testimony of O. B. Coldwell)

ratus. I don't know that I could give you any offhand statement regarding that, that would be of any particular benefit.

The question of the necessity of these sub-stations being close to the point of distribution and consumption is an economic problem—economic and engineering problem, which has to be worked out for each particular case. There are certain centers of distribution in a city such as we have here, and ordinarily sub-stations are located there, for the reason that it is essential to keep down the cost of feeders out to the customers to as low a point as possible. That means they should be as short as they could be consistently with good service. That is especially the case with the direct current system which is used in the underground area. At other points in the city, outside the underground area, there are a number of sub-stations which handle their particular districts. You can feed, probably, on those outlying sub-stations a distance of three or four miles, possibly five miles, and give good service. Our longest transmission line is about 35 miles—that coming from the Cazadero plant.

I am fairly familiar with the rates in this country as compared with the rates in the Sound country, Seattle and Tacoma. I have had occasion from time to time to make comparison between rates in existence over there and rates here. I think they are not very far apart. This whole question of rates is rather an involved one. The expression of rates is a complicated matter. In a good many instances, sometimes, the customers think they are much too complicated, but there are engineering

(Testimony of O. B. Coldwell)

reasons for expressing them so, and I say the offhand recollection of these rates, I would not pretend to give without reference to the records just what our lowest rate is. I think I know what it is, and that is the reason I said offhand recollection. I think the lowest rate we have is a rate of six mills per kilowatt hour, which is the one given to Lewis-Wiley Hydraulic Company, in a sluicing operation out here near Willamette Heights; in that particular instance the reason for the low rate being their practically continuous use of it twenty-four hours a day almost, and besides also of the load. That rate, of course, is on file with the Railway Commission. It is all a matter of public record. We have some other rates that get down to nearly the same point. The rate for the Oregon Electric Railway Company would approximate on the ordinary month, with the load factor they have, around 83/100 of a cent. That would amount to $54.70 per horsepower per annum. The rate which they have, however, would offer them an opportunity of getting a much cheaper rate per horsepower per annum if they used a little better load factor. This matter of rates is one that you cannot enter into in a hurry. You have to build it up from the beginning to get the right understanding of it.

CROSS EXAMINATION.

The aggregate capacity of 90,000 horsepower is for all of our plants and includes the capacity of the steam plants combined with the hydraulic plants. The rated capacity of the Oregon City plant is a little over 6,000

kilowatts, approximately equal to 9,000 horsepower. The rated capacity means the capacity of the machinery in it. At low water it can produce 4500 kilowatts, is my recollection. In the high water season, due to the back water in the Columbia, there is a certain cutting down of capacity for a short length of time. In the spring we are sometimes bothered to a certain extent for a month or five weeks by the back water. It cuts off the head. Owing to the conditions of high and low water, it is necessary to maintain two sets of apparatus in that plant, one for high water and one for low water—two sets of turbines. About 2000 horsepower from that plant is used at Oregon City by the Willamette Pulp and Paper Company. It may be a little in excess of that. At low water stage we have about 2500 horsepower to bring into Portland from the Oregon City plant.

The low water flow of the Clackamas River at the River Mill and Cazadero plants approximates 800 second feet, and I believe there is a Geological Survey record as low as 560 second feet, but I do not believe it gets down to that; 800 second feet is our approximate, and the flow is down to that figure possibly 90 days in the summer. It would not be down to 800 second feet 90 days. The average low water flow, I would say, would be around 1000 second feet during the 90 days of low water. We have a head on the River Mill plant of approximately 81 feet, and on the Cazadero plant it operates 120 to 125 feet.

Q. Then during the 90 days when the flow is below 1000 second feet, you have only the power at those two

(Testimony of O. B. Coldwell)

plants, of course, that can be produced from that head, no matter how much machinery you try to install, have you?

A. That is true to a certain extent. We have a certain amount of pondage there which modifies that, however.

Q. How much is your pondage or storage? How much will that modify?

A. There is no great storage installed now. I haven't the figures at hand, but I should say offhand that the pondage we have there is sufficient to equalize a stream flow for daily purposes so as to give us as much as one-third more capacity there than the low flow of the stream would indicate we would have.

Q. That storage has only the effect of meeting your peak load demand? It doesn't increase the total amount of power that that many second feet in the river would produce at all, does it?

A. No. The number of second feet in the river could only produce so many kilowatt hours. It would be the best it could do. It gives you a better opportunity of using it to advantage by increasing the peak load.

Q. If you really, as you have stated, have more power than you need, there is no object in using that storage?

A. There is no object in using that storage, no. At low water the power of the River Mill plant is somewhere around 5000 kilowatts, and at the Cazadero plant, at extreme low water, somewhere around 5000 kilowatts,

(Testimony of O. B. Coldwell)

as I recall it. For the River Mill it would be about two-thirds of that.

Q. So the total of those plants at low water stage is a very different figure from what you gave on the direct examination?

A. Well, I beg your pardon on that. I gave you what was the rated capacity of this plant.

Q. I am asking for the actual capacity, which I understand I am getting at low water.

A. It would all depend upon conditions, as I have tried to explain to you.

Q. What is the low water flow of Sandy River?

A. We haven't as good records on the Sandy River as we have on the Clackamas River. I believe it would approximate some 400 second feet for the average low water period—probably drop below that. It has been measured, I believe, less than 300 feet.

The low water condition on the Sandy continues, I should imagine, about the same as on the other river, ninety days.

We have extreme high water conditions to contend with occasionally on the Clackamas. I think the maximum reported flood is about 45,000 second feet. On the Sandy I think it is somewhat less. I do not believe it has ever been over 30,000. On the Sandy River, in connection with the plant, we have a conduit about 8 miles long, and included in that there is a tunnel something over 4000 feet. By that we get a head of 320 feet. That plant is not developed up to the point that the amount of water there would warrant. I imagine the

(Testimony of O. B. Coldwell)

low water capacity would be about 7000 or 8000 kilowatts.

Q. Do you mean to claim that 400 second feet, with the head specified, would give that?

A. I don't know. I haven't figured it out. The dam at the Cazadero plant is a log crib dam, rock-filled. The River Mill dam is a concrete dam. In connection with all these plants, we maintain here an extensive steam plant which is operated daily and carries part of our daily load, the capacity of which I have included in the total horsepower that I have said our plants are capable of producing. We depend on the steam plants to a certain extent every year to carry our load. The production by the steam plants would depend altogether upon the operating conditions. Sometimes they are only slightly loaded. In the fall season of the year they will be perhaps pretty heavily loaded for a period. We use them more or less the year around, and part of our load today is being carried by the steam plants.

We have one steam plant that is 12,500 kilowatts rated generator capacity, and another that is 6,000 kilowatts rated generator capacity. We have one down on the Peninsula with rated capacity of 2500 kilowatts. We burn principally sawmill refuse, the plants being run in connection with large sawmills here.

Q. Burning that refuse, have you ever figured what it costs you to produce the power by that means, with steam?

A. Yes. The operating cost of the plants will vary —somewhere in the neighborhood of one-half cent per

(Testimony of O. B. Coldwell)

kilowatt hour, perhaps, for the ordinary conditions of operation. I might explain in that connection it is a very difficult matter to make any definite statements about such operations; it depends so largely upon circumstances.

Q. All the figures you have given us as to the capacity of these plants are meant to apply to the generator end, are they not?

A. Yes. The amount of power we produce out where the plants are, at the generators, that is, the possibility at the generating plants.

Q. That does not allow for the loss in transmission.

A. No.

Q. You are transmitting power as far as Eugene, are you not?

A. No, we are not, but we are supplying power to an electric railway that is operating to Eugene, and they transmit it to Eugene, which is a distance of about 123 miles. We get a very much higher rate for residence lighting and for other uses where the electric current is purchased on a small scale than the rates which I have named in connection with companies that take a large amount of power.

Q. The cost of distributing system is compensated by that element of better price thus obtained, is it not?

A. That is the object in having the better price.

Q. What is the ratio of power that goes through this underground distributing system, to the power which is distributed overhead?

A. The capacity of our sub-station equipment

(Testimony of O. B. Coldwell)

which supplies that is 7000 kilowatts—I believe our peak load in this underground district has approximated that figure. That is at a voltage of 220 volts—three wire Edison system.

The load factor is approximately 30 per cent on that conduit service. That distributing system uses only about 2100 kilowatt hours daily total consumption. We get a rate on that to compensate for the low load factor.

Q. A rate of about five times what you get on the other service, such as you have specified, where the railroad companies take it, or greater?

A. That would be a very difficult thing to answer because there are all kinds of customers on that service, and they have varying rates, depending upon the class of service.

Our River Mill plant cost in the neighborhood of $1,900,000 without the transmission line to Portland. I think Mr. Morris paid $215,000 for the land and water rights there. The transmission service to Portland cost in addition about $200,000. It is a tower construction.

Q. A plant where the flow of the river could be depended upon not to fall below about 4000 second feet, and was so constant that the variation between reading of low water in April and another in August would be only about one foot, would have great advantages, would it not, and where the extreme high water conditions would not be more than perhaps six to ten times the low water flow of the stream—those would be very great advantages, would they not, for a power proposition?

A. I should say so, yes. Any stream that has char-

acteristics of that sort would be a very good stream to have a power plant on.

I would not consider the distance of 90 miles as prohibitive at all for the transmission of power. The type of country the transmission line has to go through probably has considerable to do with it. I believe the transmission from our rival company's plant is about seventy miles. I believe the tendency now is toward electrification of railroads. Several of them that were under way are suspended merely temporarily, and will take a large amount of power when they are completed. We have a contract with railroads of that sort at present, pending completion of its construction, and the Clackamas Southern was recently taken over by our company. It will be an electric railway when it is completed. The Southern Pacific has begun work towards electrifying its line from Portland to Eugene, and considerable construction work has been done toward it. I understand there is a considerable amount of material for the completion of that electric railroad on hand now. That will add materially to the demand for power. We have the contract already in hand for that power.

REDIRECT EXAMINATION.

I know in a general way what power plants there are down the Willamette Valley as far south as Eugene, besides our own power and facilities. There is a water power plant at Albany, which is part of the Oregon Power system, and they have a steam plant at Eugene, or at Springfield, right out of Eugene, where they get

(Testimony of O. B. Coldwell)

sawmill refuse. There are some of the smaller communities down there that have independent plants. McMinnville has a municipal plant—water and steam combined, and steam supplementing the water power. At Dallas, there is also a plant in that territory, steam plant.

RECROSS EXAMINATION.

Q. The horsepower capacity of the plant at Albany is about 500?

A. Yes, it is a small water power plant. I don't know what the capacity of it is.

Q. The plant at McMinnville has to shut down in low water, doesn't it—goes dry?

A. I believe so.

Q. And the Dallas plant is a steam plant?

A. Yes.

Q. So that if there were electric power that could be supplied them cheaper than they can make it by steam there would be a field in all those places, wouldn't there?

A. I think that would probably follow.

REDIRECT EXAMINATION.

Q. What is the fact as to whether or not the transportation feature is a very important one in a site forty odd miles up the river in the Deschutes Canyon, where the construction of a dam across the river is involved, for the development of 40,000 or more horsepower, and where a tunnel is planned in connection with it through basaltic rock, at an expense estimated at nearly $900,-

(Testimony of N. W. Bethel)

000—a project of that kind—tunnel alone of $900,000, the entire plant on the ground estimated at approximately three million dollars, is the transportation factor in an enterprise of that kind an important one, Mr. Coldwell?

A. I should say by all means a very important one. In the case of across the Columbia River, where the Northwestern people developed the White Salmon plant, they didn't construct a railroad, but in talking with some of their engineers about it they are very much in doubt as to the wisdom of not having constructed the road. They spent enough money in hauling things in there by team to warrant the road, and I think in most instances where a project of the magnitude of that you speak of has been undertaken that a railroad almost necessarily forms a part of it, though that may not always be the case.

N. W. BETHEL, called as a witness on behalf of the defendant, testified as follows:

I am an engineer and contractor. I have been employed in that sort of work for 35 years. From 1908 to 1910 I was employed on the Oregon Trunk line, Incorporated, and on the Oregon Trunk Railroad. I am familiar with the location of the property involved in this controversy. Was on that property frequently in 1909. I know the location of the Sherar Bridge and the dam site known as the dam site of the Interior Development Company.

(Testimony of N. W. Bethel)

I was familiar with the work that was being done, or claimed to be done, in connection with the development work at the Interior Development Company dam site, in the year 1909. I visited the location frequently after August, 1909. In August, 1909, there were three or four men working excavating from either side of the canyon walls, and depositing the excavation in the bed of the river adjacent thereto. They were working with picks, shovels and wheelbarrows. They had no cement there for the construction of the dam that I saw. The greatest number of men I saw there working was four.

Q. Were those four men working there all the time you were there?

A. I think the four men were working at this time to which I refer, but they told me that a portion of the time they were working on the toll roads that belonged to the Sherar Estate.

Q. How much work had been done there at that time?

A. It would be very hard to estimate it in yards—in yardage. I couldn't say as to the value of the work or how much they had expended, but it was only a small amount of work that they were doing.

Q. Was it work of a character which would be done if a dam 60 feet in height were being constructed at that point?

A. Well, I couldn't say as to that. It was sort of in the nature of investigation, determining the character of the rock that would be encountered, perhaps, on either side of the canyon. It wasn't very effective in the

(Testimony of N. W. Bethel)

way of the immediate work preceding the construction of a dam. I saw no work in that neighborhood or in connection with that project that would indicate the construction of any ditch or canal or flume or pipe line. I presume the work shown on defendant's exhibit 17 is the work being done there, to which I refer, or, at least, the work I refer to is a part of that shown on defendant's exhibit 17. I don't think at that time there was that much work done. They had done some work on either side of the river at that time.

Q. Would this character of work, continued up to sixty feet, hold the waters of that stream?

A. Oh, no; no, sir.

CROSS EXAMINATION.

When we constructed the Oregon Trunk Railroad, we threw down material that covered up the greater part of that work that had been done in clearing the dam site, so that an examination after that time would not indicate the extent of work that had been done before on the Oregon Trunk side. If a dam were to be built on that site, preliminary work would be necessary for the investigation of the character of the foundation, but I would say that there would be more practical means of getting at it than the manner in which they were doing it. It was a character of work that had to be done.

(Testimony of Oliver Owre)

OLIVER OWRE, called as a witness on behalf of the defendant, testified as follows:

I am a civil engineer; have followed that occupation about eight years. I am at present assistant engineer for the Oregon-Washington Railroad & Navigation Company. I have been with this organization and its subsidiary companies eight years. During the early part of 1909 I was employed on the line called the Coeur d'Alene and Lake Creek, up near Spokane. In December, 1909, I was ordered to report to Mr. Brandon at Grass Valley. From that time on I was employed as a resident engineer near Sherar's Bridge until in August, 1910, when the work was completed. The grading was completed in August, 1910. In December, 1909, when I went upon the work, I would say that the work was about 25 per cent completed between Mile Post 42½ and Mile Post 50. That covered the property in controversy in this case.

Q. Was it apparent at that time where the grade of the line of the Deschutes Railroad would be on the side of the hill at the dam site of the Interior Development Company?

A. Well, right opposite the dam site, I don't think it was apparent, but at a distance of, I should say 500 feet above, and extending for a distance of perhaps 1100 to 1200 feet, the grade was practically completed.

Below that there was some work in progress at different places between Sherar's Bridge and the dam site, and there had been some work done at Buck Hollow,

that is, at the excavation immediately south of Buck Hollow. I had, to some extent, charge of the reconstruction of the toll roads. The toll road leading from Sherar's Bridge towards Shaniko was practically completed when I took charge. I saw a portion of the toll roads before they were reconstructed. I should say the reconstructed portion of the road was substantially better than the old portion of the road.

Mr. Veazie: May it please the court, I think it ought perhaps to be clear that we are not asking damages in this case for anything in connection with the character of reconstruction of those toll roads. So far as this suit is concerned, it is on that one road being located through the power house site. That is all we are complaining of in this case.

Witness continuing: During my residence there I lived approximately three miles above Sherar's Bridge. During the early part of my residence there, I was along there nearly every day; I should say at least four times a week. I frequently observed the work that was being done at the dam site during that period. The work itself, I should say, was of a very temporary character, that is, they were excavating material from the hillside, on the east and west side both, and carrying it to the river and dumping it by wheelbarrow; that is, by hand. I didn't notice any cement or any equipment for the construction of a dam beyond the ordinary pick and shovels and wheelbarrow. The most men employed there doing this work I ever noticed was five men, and

(Testimony of Oliver Owre)

they were not there continuously. I couldn't say how many men were there most frequently. The time I noticed these five men was along in March or April. It was after the high water in March, that washed out a considerable portion of the wingdams, and they seemed to be prosecuting the work with more vigor after that to construct a portion of the wingdams. During part of the time I noticed one man on the east side.

Q. Were there periods when there were no men at work there at all?

A. Oh, yes, there were periods when I didn't notice any. I wouldn't say there were no men working there at all, but at least I didn't notice any.

Defendant's exhibit 17 shows the character of work that was being done by these men. The exhibit shows the east wing wall.

Q. Were these men working as though they were working to accomplish any purpose?

A. Well, frequently I should say they were not. I found them quite often sitting down and smoking, enjoying the fire; that is, during the cold weather, I found them quite often doing that. They were sort of working at random. I have been up there three different times since then. The last time was in November, 1913. Defendant's exhibit 28 represents substantially the progress of the work as it existed at my last visit, over and above that shown in defendant's exhibit 17. Exhibits 28 and 17 represent the same place. I never noticed the construction of any ditch or work on any ditch or any canal or flume or pipe line, or on any tunnel for carry-

ing water from the proposed dam. I never noticed any sand or gravel available at the site for the construction of a dam, within the limits of my residency.

Q. What would you say, Mr. Owre, it would cost, working reasonably energetically, to construct wingdams of the character of those that were in the river at that time?

A. I made an affidavit at the instance of Mr. Littlefield, and in that affidavit I stated that I thought $800 would fully cover any work that had been done up to that time. At the time that I made that statement I was aware that it was probably more than the work would actually cost, but I wanted to be liberal in my statement so as to do justice to any work that had been done, the difficulties of which I might not have been aware of. After that I talked the matter over with some of the station men I had charge over, and they were practical men—one man was an expert stonemason. I asked him what he thought he could do that work for, and he said, "Mr. Owre, I would be glad to undertake to do that work for $400."

I estimated the material in the wingdams at the time. I should say it was close to 1200 yards.

Q. How much material would you say was in those wingdams when you were there in November, 1913?

A. Well, I didn't pay any particular attention, but it seemed to me that the size of the wingdams was not materially increased. The one on the east side might have been extended a little more, perhaps 30 feet, into

(Testimony of Oliver Owre)

the river. That is only approximate. I just made a guess at that.

Q. Do you think it would take three or four men four years, working reasonably energetically, to put the additional material there in 1913 over that that was there in 1909?

A. I certainly do not.

They would have a pretty hard time putting in their time, if that is all they put in there. I am positive it would not cost $14,000 to construct those piers.

CROSS EXAMINATION.

I do not deny that four or five men have been working there. There were times that I didn't notice any men, and there were times when I only saw one, and other times I saw only two men. There was a time during January, 1910, for I should say possibly a week after New Years, when I didn't see any men; and then during March, 1910, during high water, there were no men working there. I presume the reason was on account of the high stage of the river. I didn't notice any test pits between the side of the dam and the point where the wagon road crosses the Deschutes railroad, but north of that point on the power site, I did notice test pits had been dug on the side of the hill; possibly four or five pits, I won't say how many. Those were above the present railroad grade and I think they are there yet.

I arrived at Sherar's Bridge on the 17th of December, at which time the work of grading on that whole stretch was about twenty-five per cent completed. The

(Testimony of Oliver Owre)

Railroad Company was working with picks, shovels, and wheelbarrows at that time largely, which is the usual means of accomplishing such results to some extent, at least. I noticed Mr. Hammett and his surveyors there doing work on this power project in the months of January and February, and showed Mr. Hammett some of our bench marks, and the grade points in the vicinity of the dam and above, and also below. There are quite a number of fills along our road there from the dam site to the head of the pondage that would be caused by a sixty-foot dam, but our fills are not very deep at that point with the exception of one or two.

From the dam site north, and for a distance of possibly 500 feet going south, our fills or embankments extend down onto the road bed of the old Shaniko road. The wagon road constructed north of the dam site was largely built up with loose rock, and south of the dam site it was largely of earth construction.

REDIRECT EXAMINATION.

At the time I took charge, I should say there were nearly 200 men at work on the seven and a half or eight miles I had charge of. I know approximately where the power house site is. The bulk of the rock thrown over the grade at that point, I should say, is within one hundred feet of the center line of the Deschutes Railroad. For a distance of about 1000 feet, extending 600 feet north of the power site and 400 feet south, my notes will show that there was excavated approximately 10,000 yards, and that was deposited on the side of the hill out-

(Testimony of L. A. McArthur)

side of the railroad grade, but within 100 feet of the center, that is, the bulk of it.

L. A. McARTHUR, a witness on behalf of the defendant, testified as follows:

I am in the public utility business, connected with the Pacific Power & Light Company as Assistant General Manager. That company operates principally in the southern and southeastern part of Washington, although there is one plant in Astoria, a small plant at White Salmon, one at Goldendale, and one in Wasco County and in Hood River County. The principal business of the company is the generating, transmission and sale of electrical energy. I have a map prepared and published by this company, showing the different locations in which it maintains and operates power plants, and showing the transmission lines and territories served. I here present a map, published on May 1st, 1911, which is slightly out of date but not essentially so. The general scheme of this map is practically up to date.

Thereupon the map was received in evidence and marked defendant's exhibit T, and accompanies this record.

All of the plants indicated upon the exhibit are operated as indicated on the exhibit with the exception of one plant at Priest Rapids, which is operated by a company that is controlled by the same people in the East as the Pacific Power & Light Company. It is not owned by this company, although shown on that map.

(Testimony of L. A. McArthur)

With reference to the power available as developed by our company, we have a large generating and transmitting system that extends from a point near North Yakima, to Walla Walla and Pendleton, and on that system we have power plants with an installed capacity of about 14,850 kilowatts. It woud be approximately 20,000 horse-power; something less than that, about 19,800 horsepower. West of that there are two small systems —one at Goldendale, with 200 horsepower, and one at White Salmon, with 100 horsepower. In Wasco County there is one at White River Falls, down near the town of Tygh Valley, of 2250 kilowatts, or approximately 3000 horsepower. The company owns also in The Dalles plants with rated capacity of 450 horsepower. In Hood River is a plant owned by us, but leased to the Hood River Gas & Electric Company. It is the one I mentioned of approximately 250 horsepower. There are two plants there, one of which is not operated, the combined capacity of which is 400 horsepower.

Q. Are any of those plants taxed to their capacity at the present time?

A. Well, I cannot say as to the Hood River plant, because we don't operate it, but as far as the Tygh Valley plant is concerned, the load on that in March was 735 kilowatts, or approximately a little over 1000 horsepower. There is a surplus, I should judge, of probably 1500 horsepower. While it is true we have 3000 horsepower installed there, the probable capacity of the plant as limited by the water would be somewhere in the neighborhood of 2500 horsepower. That would leave us a

(Testimony of L. A. McArthur)

surplus in March of about 1500 horsepower. In January our load was 1600 horsepower, but it fell off in March. The average load of that system for the year is somewhere in the neighborhood of 1250 or 1300 horsepower, that is, the average monthly load. I should judge that plant is probably two miles from Sherar's Bridge.

The Yakima system is not connected with the system at The Dalles or Hood River. Up in the Yakima country the highest load in April we have had in there has been about 6000 kilowatts or 8000 horsepower, and we have installed there pretty close to 20,000 horsepower, so there is available surplus power somewhere in the neighborhood of 12,000 horsepower installed. There is some possible further development there. There are several small developments, one near North Yakima; and there is a very large possible development at Priest Rapids. It is pretty hard to state the capacity of the Priest Rapids project. It has been estimated all the way from two to three hundred thousand horsepower. It is very large. There is no very accurate data on it, but I should judge the minimum there would be 200,000 horsepower. The territory we serve is down as far as White Salmon on the Washington side, and as far as Hood River on the Oregon side. The immediate prospects of additional demand, I should say, are rather limited, although there is no question but what there are possibilities of further developments if railroads electrify, etc., but at the present time we fear that we serve almost everything that requires power. There are very

(Testimony of L. A. McArthur)

few enterprises of any importance in the territory that we do not serve electrically.

The Pacific Power & Light Company has not investigated the Deschutes River at the Sherar's Bridge site, but the American Power & Light Company, which controls our company, had a man in there several years ago. He investigated the Deschutes all the way from the mouth to Odell Lake. Based on my own judgment I should say the reason why the power on the Deschutes has never been developed is because there is no market in there at the presnt time; there is no demand for it. I cannot say as to whether there is any market demand in Portland. I suppose there must be a certain amount of market that is always attendant upon a city of this size; but whether the Portland Railway, Light & Power Company and the Northwestern Electric Company furnish it all, I cannot say. I don't know whether there is any surplus business. The surplus business on the Washington side or on the Oregon side, east of the Multnomah County line, is very limited. There are practically no industries in there, between the summit of the Cascades and The Dalles, and so far east as Pendleton and as far north as Walla Walla, and as far north and west as North Yakima. As far as I know, the only industries in there that do not use power are small irrigation plants, scattered along from place to place, that are using gasoline. We have surplus power to carry on a very substantial additional amount of business.

(Testimony of L. A. McArthur)

CROSS EXAMINATION.

We have not been required to use our steam plants at all during the year 1914 up to date. We had to use the steam plants last spring at North Yakima, because we were rebuilding one of our canals. Last summer and fall, after our canal was built, we probably at no time had a steam load of over 1000 kilowatts, authough we did carry steam load part of the time. We had to reserve the right to shut down the pumping for irrigation during the afternoon in the past, but not this year. We won't have to do that this year. We increased our capacity up at North Yakima. The demand for power for irrigation has increased spasmodically. It increased last year, but this year it has not increased. We have taken on no new projects this year of any considerable size. We did last year take on one at Burbank, about 600 horsepower. We have had trouble with ice at various times, but no trouble this year of any consequence.

We increased the capacity of the White River Plant, located near Sherar's Bridge, in 1910—nearly doubled it. We have a steam auxiliary plant at Walla Walla, which we have used very little this last year. Had to use it some last summer. The steam plant has 1000 kilowatts capacity, and the hydraulic plant on the Walla Walla River has three 500 kilowatt wheels, and one 1250 generator. None of the plants in the Walla Walla territory have been increased since we took them over in 1910, although we put in a new generator in the Walla Walla River, and last spring, near North Yakima, we

(Testimony of L. A. McArthur)

put in a new generator and a new wheel, which was partly an increase of power. I should judge we could get at the present time, by water, about 1200 kilowatts more than we could in 1910. We thought the market conditions justified that increase. I think there was a small increase at Prosser, about 200 kilowatts. We had rather substantial increases in 1910, 1911 and 1912. Since then we have not had any increase, and as a matter of fact we have generated less power. We are generating less power today than we were a year ago, month by month. There have been no substantial new plants coming into the field surrounding Portland that I know of, except the one at White Salmon by the Northwestern Company. The plant at Mt. Hood is a recent plant, too. The River Mill plant on the Clackamas was started in 1908. Near Portland there have been some large developments in the last few years. The largest possible development at Priest Rapids would be, on an air line, about 190 miles from Portland, and by the probable route over which power could be brought in here, it would be at least 200 miles.

As to the rates we are getting, they vary with the nature of the business and the size of it. In Walla Walla we get 10 cents a kilowatt hour for the first kilowatt hours. All over that, it is eight cents. That is the net rate for lighting purposes. In The Dalles the rate is the same, and in North Yakima and throughout our territory. In some small units it is slightly higher. On the irrigating work we have a flat rate and a meter rate. Most of the customers are using the meter rate, which

(Testimony of L. A. McArthur)

is based upon a fixed charge of $12 a horsepower year, and in addition to that there is a meter charge of three cents a kilowatt hour for the first 30 kilowatt hours' use of the customer's connected load whenever the customer runs. In other words, if he had the kilowatt connected, he would pay three cents a kilowatt hour for 30 hours' use, and then there is 60 hours at two cents, 60 hours at one cent, and all over 210 is ½ cent a kilowatt hour. It would figure out about $5 a horsepower a month; about $30 a horsepower a season for six months' pumping. They use their motors only about six months. That includes the fixed charge of $12. The power is available to them the rest of the year if they want to pay the meter rate for it. They can use the motor in the winter time to cut fodder, or saw wood, or anything else, simply by paying the meter rate as long as they use it. What they don't use the rest of the year we can have the benefit of for other uses. Whether it would make a difference with the demand if a power project were installed that could greatly lower the rates is problematical. Of course, the contention of a great many people is, if the rates were lowered, there would be a great deal of increased business, but we have found that when we lower our rates, as we have had to do several times, particularly our lighting rates, and some of our power rates, the increased business that we hoped for did not materialize. I should say that we are earning practically no more today than we were a year, or even two years ago, in our lighting business, because there has not been the attendant growth that might be expected. The times

(Testimony of R. Lenoir)

have not been particularly good, and it has not been a period of business advancement.

REDIRECT EXAMINATION.

I would not say that in the Walla Walla country, Umatilla County and Wasco County, and, in fact, the entire grain belt, that the last year has not been a prosperous one. I understood Mr. Veazie was referring particularly to fruit.

The rate quoted for Walla Walla, The Dalles and Pendleton was the net rate after deducting the prompt payment discount, and was for retail customers. The same rate is applied to all, but the large consumers will, by the large quantity used, get the benefit of lower rates.

RECROSS EXAMINATION.

The lowest rates we quote are the flour mills and refrigeration plants, because they generally run 24 hours a day and all the year around. That would run about $76 a kilowatt a year per horsepower, for 24 hours' service.

R. LENOIR, a witness called on behalf of defendant, testified as follows:

I am assistant engineer for the Oregon-Washington Railroad & Navigation Company; have been with them eleven years. I am familiar with the location in and around Sherar's Bridge. I took some photographs in

(Testimony of R. Lenoir)

that vicinity last week, last Thursday. The photograph produced is of the power site below Sherar's Bridge, located in the north half of the southwest quarter of section 35, township 3 south, range 14 east, and the photograph represents the condition shown last Thursday.

The photograph was offered in evidence and marked Defendant's Exhibit U, and accompanies this record.

The line of road along the lower left hand corner of the picture is the road that goes to Buck Hollow, the Grass Valley road. The photograph now handed me shows the waste material which was blasted from the hill during the construction of the railroad. That was taken from a point in the northwest quarter of the southwest quarter of section 35, and is looking east from that point, down stream. That photograph accurately represents the wasted material at that point.

Thereupon the photograph was received in evidence, marked Defendant's Exhibit V, and accompanies this record.

The photograph now presented represents the railroad station at Sherar's Bridge—the station of the Deschutes Railroad Company, located in the southeast quarter of the southeast quarter of section 34, township 3 south, range 14 east.

The photograph was received in evidence and marked Defendant's Exhibit W, and accompanies this record.

The photograph now presented represents the dam site as it existed last Thursday, and represents all the

work that has been done at that place, or in that locality, with reference to the construction of the dam.

Thereupon the photograph was received in evidence and marked Defendant's Exhibit X, and accompanies this record.

I didn't see any men working at the dam site when I took the picture, but I met a gentleman in the hotel who said he was working on that dam. He did not say what he was doing. Walking by these, I saw some false-work; just exactly what the nature of the work is I cannot tell.

CROSS EXAMINATION.

I mark on defendant's exhibit C, with the letter U, the point where I took the photograph, Exhibit U, approximately, about opposite the line which runs from the figures 675, in the northeast quarter of the southwest quarter of section 35. I was about a thousand feet up the river from the mouth of Buck Hollow when I took the picture. I mark with the letter V the point from which the exhibit V was taken.

H. A. BRANDON, a witness called on behalf of defendant, testified as follows:

I am a civil engineer in the employ of the O.-W. R. & N. Company. I have been acting as a civil engineer for about 26 years. I have been in the service of the O.-W. R. & N. nine years. I was engineer in charge

(Testimony of H. A. Brandon)

of the construction of the Deschutes Railroad line up the Deschutes River. I am familiar with the location in and around Sherar Bridge. The construction of the line was commenced in that vicinity in September, 1909. The grade was completed up through the Sherar property about May, 1910. On the first of April, 1910, I should say it was about 80 or 90 per cent completed. The work on that construction through that property was continuous from September to April or May, 1910. It would be guesswork if I stated how many men there were at work there, but there must have been 100 to 150, I should say. By the end of September, 1909, I should say the grade of the line was pretty well defined in places on the ground so that any one in the vicinity could ascertain approximately where the line was to be, or the elevation where the line was to be constructed. The line was constructed through the Sherar property and up over the dam on the elevation as shown on the profile, Plaintiff's Exhibit 31. The elevation shown there in red lines is the subgrade. The base of the rail is 1.25 feet higher. This space is taken up by eight inches ballast and seven inches for the ties, which makes it 15 inches. The difference in the cost in the construction of the present constructed line over and above the estimated cost if said line has been constructed as originally surveyed along the water bed is $124,000. The cost in changing the toll road is about $20,000.

I am familiar with the location of the proposed power plant that has been talked about, in section 35. The amount of debris on that location is not very consider-

(Testimony of H. A. Brandon)

able. It is waste from the cuttings and surplus material from the cuttings, simply dumped over the side of the grade.

Q. Do you know whether or not the debris is all within 100 feet of the center line of our track at that point?

A. I don't think it is as far out as 100 feet, anyway.

I superintended the reconstruction of the toll road. Defendant's Exhibit S shows the line of both roads, the original road and the way that it is constructed now. It accurately represents the road as reconstructed with relation to the center line of the Deschutes Railroad Company. I was in that neighborhood frequently during the construction of this road, and saw the alleged development work there at the dam site during that period. There is no development work at any other point than that designated as the dam site on Plaintiff's Exhibit C. There is no development work or work of any kind looking towards the construction of a dam or reconnaissance for a dam at the section line between lot 2 and the southwest quarter of the northeast quarter of section 3, township 4 south, range 14 east. I never saw any development work, or work of any kind, down at the quarter section corner separating the north half and the south half of section 3. If there had been any such work here, I or one of my assistant engineers would have seen it. The orders of my assistant engineers were to report anything of that sort to me. The development work which was referred to in this case is not, in my opin-

(Testimony of H. A. Brandon)

ion, such as would have required the expenditure of $14,000 for five and a half years of continuous work. I should say $500 or $600 would have been the reasonable expenditure to have accomplished all the work at that point today.

With reference to the question of back water from the dam playing against the grade of our line and injuring it, it is practicable, by riprapping or otherwise, to preserve the grades of the road against the action of the water.

Q. Is the present location and elevation of the Deschutes Railroad at the so-called dam site such as will permit, as a practical engineering matter, of the construction, maintenance and use of a power dam in the Deschutes River, to an elevation of 60 feet above low water in the river?

A. Yes. There will be about 4½ feet leeway between such an elevation and the sub-grade of our line. This difference will increase about 1¼ feet between that point and a point 200 or 300 feet above the dam site.

Q. Will that distance, in your opinion, be sufficient, or is it practical to take care of the flood waters of the Deschutes River within that difference?

A. I can only say I think so, for the reason that I did not make any surveys to determine how much area would be required at the top of the dam there for that, and it is necessary to obtain slopes, to take care of abruptness, and everything else.

There are places on the line of the O.-W. R. & N. where the wash against the grade of the line is taken care

of in the manner above indicated. At the Furnish dam site in Eastern Oregon, in Umatilla County, the water was actually taken over the top of the rails and passed through our tunnel there, and the banks are protected by sand-bags, to cause the waters to pass away, and it didn't injure the railroad very much. That preserved the grade there temporarily.

Q. Now, Mr. Brandon, this work—this alleged development work—is that, in your opinion as an experienced engineer, such work as would be done in good faith if these parties were intending to construct a dam at that point?

A. It is certainly not.

CROSS EXAMINATION.

Construction was begun at the tunnel about three miles below the power site in December, 1909, from the coloring on the progress profile here. That was the first work in the way of actual construction of the tunnel.

Q. How much of the time were you out there on the ground in connection with this work?

A. Oh, every three or four weeks I was over the work. I walked over the work in different stretches at different times.

My headquarters was Grass Valley, and I had charge then of the Deschutes Railroad, the Lake River, Coeur d'Alene, and the Elgin extension—three different railroads. My time was spent nearly always in the field, either one place or the other. My time on this particular

(Testimony of H. A. Brandon)

part of the project at Sherar's Bridge consisted practically in a visit there and inspection of progress every three or four weeks. There was a railroad already in operation to Grass Valley at that time and had been for years, and it is a down hill road from Grass Valley to Sherar's Bridge.

I am not a hydraulic engineer. My engineering experience is confined to railroad and fortification work. Construction work was begun on this part of the road across the Sherar lands not later than the middle of September. Work was done at Mile Post 44 during September and October. It was completed in October. The exhibit from which I spoke shows, by the legend in different colors, the progress each month. The ties and rails had not been laid over this portion of the road in May, 1910. To the best of my knowledge, the ties and rails were laid about October, 1910. The bridges were not in by the first of May, 1910.

Q. So that, as a matter of fact, there was no railroad over these lands on the first of May, 1910?

A. No.

Q. Only a practically completed grade?

A. Yes.

Q. Without bridges?

A. Yes.

Q. Did the cost of construction of the portion of the line which was elevated in order to pass over this dam site exceed the original estimate made for it?

A. I don't know. I never saw the original estimate. I only had to do with the actual cost.

(Testimony of H. A. Brandon)

Q. You couldn't say, then, whether the actual cost exceeded the original estimate?

A. No. But very likely it did, because as a rule it did up that canyon.

Q. About what was the usual excess?

A. Well, it varied in different places. Places where we encountered these mountains of shale rock, the estimate might be increased 100 per cent. Rock that was not expected to come down would come down on us, maybe, and had to be moved.

Q. So that it is possible that the cost of construction of the high line involved greatly exceeded its original estimate also, might it not?

A. It may have.

Q. And you think it probable from your experience generally along there?

A. I think it is probable, yes.

Q. What was the cost of construction per mile, the actual cost of construction per mile, on the average, through there, as well as you can give it?

A. Well, I could only trust to memory, and I would not venture to say.

Q. You feel that you could not give even an approximately accurate statement of it?

A. You are speaking of this three or four miles?

Q. Yes.

A. Or of the whole distance up the Deschutes?

Q. You can give it for these three or four miles, or six miles, if you have it there.

A. Well, I will give it to you the whole distance.

(Testimony of H. A. Brandon)

Well, the grading alone would average about $50,000 per mile up the Deschutes River.

Q. The remaining costs would be the same no matter what the location would be? That is, ties and rails would cost the same per mile on either location?

A. Yes.

Q. The figures you have just given are actual cost?

A. They are actual cost, yes, sir.

Q. You didn't know, as a matter of fact, that the railroads covered up work there that had already been accomplished, in stripping the loose rock and tearing the work down to bedrock before either of the railroads went in?

A. I know that my assistant engineer on the work reported that there was a good deal of scratching done in places there where our railroad was being built, and he ordered it to be built in, and he said there was no objection made to it. There were two or three men working there. He ordered the road built right across it.

Q. So it would not appear on the ground there what may have been done, before the railroad was constructed, in the way of clearing the sides of the river preparatory for the foundation for a dam, would it?

A. As he reported, the work was done in such a desultory fashion that I didn't think it would amount to anything. It was scratching here, there, and everywhere, as far as he saw.

There is a great deal of basalt rock in that canyon, suitable for use in any heavy rock construction that might be undertaken. I have never examined the sand

at the mouth of White River as to its suitability for construction purposes. I was informed there was a great deal piled there. I think this information came from one of the Oregon Trunk engineers. He was speaking of obtaining sand and said there was a great deal at the mouth of the White River, which he said he thought was suitable for construction work. I think the sand used on the construction of our line was hauled in from Umatilla.

Q. If there should be a sixty-foot dam constructed, and the rise of the water came in there at high water so you had 7½ feet over the crest of the dam, it would overflow your roadbed, would it not, for a number of miles above the dam?

A. It certainly would, yes.

Q. If the water should rise to a height of eleven feet, of course the overflow would be greater?

A. We would be somewhat worse off.

Q. You are not willing to say, as a railroad construction engineer, that the road would be safe with that depth of water on it, are you?

A. With eleven feet of water over the crest of the dam?

Q. Eleven feet, yes.

A. No, I certainly don't think it would be safe.

Q. The grade of the road is built, over a considerable part of the distance for three or four miles above the dam site, on steep hillsides, is it not?

A. Well, it is pretty well supported. It is on the hillside, but it is pretty well benched in in places.

(Testimony of L. B. Wickersham)

Q. A good portion of the way there are benches, and a considerable portion of the way it is built on grade, is it not—been cut down?

A. Well, we have embankments, yes.

Q. That material is loose rock mixed with volcanic ash soil, is it not?

A. Quite a good deal, yes.

Q. Does that character of soil possess firmness under the action of water or not?

A. Not unless it is very well protected.

Q. It is not now protected, is it, in any such way?

A. No.

L. B. WICKERSHAM, a witness on behalf of the defendant, testified as follows:

I am chief engineer of the Oregon Electric and United Railways Company. I have been, and I am at the present time chief electrical engineer of the Spokane & Inland, Oregon Electric and United Railways. The Spokane & Inland operates south from Spokane. It operates through a power plant at Nine Mile on the Spokane River. We have about 200 miles of electric line in Spokane, and the Oregon Electric and United Railways have about 186 miles, the two lines together. I have been chief engineer and chief electrical engineer for these systems for seven years. These roads are owned and controlled by the Hill System. During the last seven years, we have examined a great many of the rivers capable of power development in Western Ore-

(Testimony of L. B. Wickersham)

gon and Southern Oregon, and prior to that time spent about five years for a syndicate in the investigation of hydro-electric plants in the West. I have been up the Deschutes Canyon—was up there just when the railroad construction commenced. We have in hand now a 50,000 horsepower development under consideration, which we have designed on the head waters of the McKenzie River, and we have a water power plant at Spokane which is completed and in operation. The Spokane plant is of 19,000 horsepower capacity.

Q. Are you familiar with market conditions in this territory so that you can state whether or not there is available a reasonably immediate prospective market for large power development in this territory?

A. Well, our investigations as to the likelihood of being able to dispose of such power as we could not use ourselves led us to believe that the Portland market at the present time is very much over-developed.

With reference to the conditions in Eastern Oregon and Southeastern Washington, I would say, in Spokane they have approximately 30,000 to 40,000 horsepower over-developed there now, and with the completion of the Long Lake development, they will have about 70,000 horsepower more.

I have read the testimony in this case, given by engineers Dillman, Thompson, Stoddard and Kyle. I have seen the report of White & Company as introduced as an exhibit in this case, on the proposed and contemplated power development at Sherar's Bridge.

Q. Now, from this report and this testimony, did

(Testimony of L. B. Wickersham)

you determine the low water elevation at the Sherar's Bridge site on the river?

A. The engineers on the ground who have examined it on the ground, and as embodied in this report, agree on 715.3 as the elevation at low water at the proposed dam site. The minimum flow over the period of time of available record seems to be approximately 5000 second feet; that is, the minimum flow available there at the present time without considering the possible reduction of storage conditions. That, however, is not the minimum flow that will apparently be accepted in a power development.

I should say, to be safe against over-development, it would hardly be safe to assume 5000 second feet. Most of the engineers in their reports have agreed on anywhere from 4000 up to 4500, which I think would be more nearly proper in a development of this kind. The maximum flood stake over the ten years seems to be 30,600 second feet. I am familiar with the character of that stream. I should say 30,600 second feet in addition to the possible discharge of 6500 second feet which could be taken through the tunnel, a safe flood stage to be taken care of there. I think that would be a safe margin to figure on. I think you would be just as safe for accepting that as a maximum as you would be for accepting 4500 as a basis of development and investment for the minimum. I should think it would be more probable that you would have less water than 4500 second feet, than that you might have more than 30,600 second feet.

Q. Now, with that condition present there at the

power site and with the base of the railroad grade of the Deschutes Railroad Company at the elevation of approximately 779 feet, as an engineering proposition, would it be practicable to construct, maintain, and operate a power dam in the Deschutes River at the site in question 60 feet in height, in your opinion; that is, 60 feet above the low water mark of 715?

A. Yes, I think it would be quite possible to do it, quite practical to do it with the proper conditions of construction.

Q. I wish you would explain to the court on what theory and how you arrive at that conclusion, and the manner in which it could be handled.

A. The only engineering feature involved, of course, in the construction of a 60-foot dam at the proposed site, would be the question of taking care of the flood stage of the river, 30,000 second feet. You would have an additional margin, of course, of the discharge to take through the tunnel. That could be done in numerous ways, in under-ways. It could be done by having the masonry crest 55 feet and using flash boards. It could be done with a removable section of dam. It could be done by siphons. There are half a dozen different ways that are in practice and practical to take care of the surplus water that would occur at the flood stage over the dam, and at the same time regulate your head, so that you would always have your 60-foot head.

These different methods which I have referred to are in use. We are now figuring on five foot flash boards on our 62-foot dam across the Spokane River.

(Testimony of L. B. Wickersham)

In fact, we expect to put them in this summer. The discharge on the Spokane River runs up to eight and ten thousand second feet. I don't think there is anything objectionable from an operating standpoint in the use of flash boards.

Q. The flowage area at the present level of the river, of course, is a great deal less than it would be over the dam. How much additional water would be taken care of, the flow over the dam, with a width there of I think about 440 feet as against the present bed of the stream?

A. Well, the present bed of the stream, as I recall it, is 100 to 150 feet less than what would be possible spillway over the dam at 60-foot height. I should judge that you could probably, if the White plan of development is carried out, and the water-way is carried down below the dam, the power house not built on the dam, it would be possible to gain a 500-foot spillway there. I notice J. G. White at one place figured on a 500-foot spillway with 6½ feet as the maximum over the dam on a 60,000 second feet discharge, which seems to be all right.

Q. You were speaking of having a movable section in the dam. Would that be at the base of the dam, or what portion of the dam would that be in, to take care of flood waters?

A. That would be at the crest of the dam. It would really be a flash board proposition, which could be operated by power and regulated and lifted at time of flood, so that the same height of water could always be

discharged, so far as the elevation of the water over the dam is concerned. In other words, in flood stage you would raise your flash board or removable section and prevent the water from raising over the allowable elevation.

The maximum flood waters of the Deschutes is about seven or seven and a half feet on a 450-foot spillway. If you took the flood discharge through the dam under pressure, you would have to have a waste-way under the dam, either tunnel or conduit of some kind, which could be regulated to carry it under the dam, or around the dam. As to the relative volume of water which could be accommodated by an exit at the foot of the dam, as compared with the flow over the crest of the dam, it would depend on the size of the area that you chose and the head that you operated under. You will note that in the J. G. White report, in which their water way through or to the one side of the dam operates, I believe, under 35 foot head, they expect to discharge 6500 second feet in two tunnels of 20-foot diameter. That would give you some idea of the possibility and practicability of that. It is a part of the scheme of development that J. G. White proposed in this case.

I have seen the plans of the proposed Columbia River power project development near Celilo. In those plans the same condition exists there as exists on the Deschutes River, namely, a very heavy flood season which must be taken care of in order to protect the Celilo canal, and also the two railroads, and the proposal in that case is a removable type of dam which can be

(Testimony of L. B. Wickersham)

raised so as to prevent the flood waters from reaching an excessive height. There is a diagram shown in the drawing presented here, which has been designed by Engineer Harza for the Government, which shows a removable type of dam proposed for this development. The construction referred to is on page 42 of the report of the State Engineer for 1910 to 1912.

Thereupon the report was offered and received in evidence, and marked Defendant's Exhibit Y, being objected to by plaintiff as irrelevant and immaterial. Same accompanies this record.

Preceding Exhibit Y, found on page 42 of the report, is a drawing numbered figure 15, inserted between pages 40 and 41, with legened "Proposed General Layout of Power Development," that shows a plan in which is also shown a removable type of dam and how it proposes to regulate the flood waters of the Columbia River on this development. In my opinion, a construction of that type is quite practicable.

Thereupon the drawing was offered in evidence, marked Defendant's Exhibit Z, which was objected to by plaintiff as irrelevant and immaterial. Same accompanies this record.

Q. Now, returning to the flash board development and use of flash boards, what is the comparative cost of using flash boards, with dam construction, as compared with solid masonry?

A. Well, of course, that varies a great deal according to the height of your flash boards and the con-

ditions that you have to meet. But in this particular case, the removal of masonry, or the reduction of masonry with the addition of flash boards, I should say that the saving in masonry would more than pay for the cost of the flash boards.

If you used the crest of your masonry dam, that is, if the crest of your masonry were at 55 feet above mean low water, and your flash boards 5 feet, you would have a 60-foot dam; that is, you would have the head of 60 feet at the dam site which you are endeavoring to secure at low water, and at high water with your flash boards out you would have that and probably a little more. You can thus maintain your effective head to 60 feet. The use of flash boards is a very common practice, quite practical. We are figuring on it in our power plant on the Spokane River. We wish to increase our head there and our pondage, and we are adding five feet on our flash boards. I know it was used here at Oregon City for a number of years and I have known of a number of other places where it is used—very common practice.

I have acted in an advisory capacity in connection with the Chelan Lake power development on the Great Northern at Lake Chelan. That is a project of about 72,000 horse power. There are a number of advantages of having a power site west of the range as compared with east of the range. One of them, of course, is that you have your market over a larger portion of your transmission line; and another thing is that you do not have to cross the range, which is certainly an objection to putting a high tension line over a mountain range

(Testimony of L. B. Wickersham)

four or five thousand feet high; the difficulty of properly maintaining it in the winter time and the possibility of interruption. I think of two power plants, one on the western slope and one on the eastern, the western slope would naturally have the preference. As to whether or not it would be practicable to take the short direct route over the mountains from the Sherar site in transmitting power, if the contemplated market were in Portland, I would say it might be practicable. You could not take a direct route, but you probably could carry it over the range. It would, however, be expensive construction and it would be rather difficult to maintain on account of the danger of interruption by the heavy snows and the difficulty in having accessible a proper control—the heavy snows on the summit.

I could not tell definitely, whether it would be a more proper engineering location, to locate the power line over the range or down the Deschutes River and down the Columbia into Portland, without actually going over the two proposed routes, but I should judge that the way to go would be to go down the river and follow in the way the railroads do. It seems to be the easiest to build and the easiest to maintain, although that conclusion might be modified after an inspection of other routes. In going over the mountains, I don't think on a plan of development of this kind, that you would be safe in contemplating to contract power on one pole line. You would simply be inviting the loss of business. We have in Spokane, through level country —we carry a double pole line 60,000 volts. In this case

your voltage probably would be 100,000, and I should judge you would certainly want a double pole line. Under the proposed White & Company plan, I am of the opinion, assuming there was a minimum flow of 4500 second feet, that there would be a power development of about 46,000 horse-power at the plant. Of course, it would have to stand the transmission losses in addition to that, and these would amount, depending upon the voltage, anywhere from 5 to 7 per cent.

Q. Engineers Thompson and Dillman testified in this case that by reason of the fact that the Deschutes Railroad located 4½ feet lower than the Oregon Trunk, that is on the opposite side of the river, that the loss in power that must result from the curtailed construction of the dam amounts to practically 1500 horse-power, and that the resulting damage to the power site in its undeveloped condition is from seventy-five to eighty-five thousand dollars. What observation, if any, would you make with respect to that conclusion?

A. Well, the natural observation on a conclusion of that kind would be this: That if 5 feet at that elevation were worth $85,000 and that if each additional five feet added on top of that up to the economic height would be a correspondingly lost amount, if you went in the other direction and reduced it five feet down to the base of the dam, you would probably arrive at the value of the entire site if it was wiped out of about a million and a half dollars undeveloped.

Q. Well, don't you think that power site is worth a million and a half dollars undeveloped there?

(Testimony of L. B. Wickersham)

A. No, I do not. I would not consider that an undeveloped power site of a capacity around 40,000 horse power, without flowage rights, simply in the rough, would be worth any such money in this part of the country.

The basis of a value of undeveloped power, of course, is somewhat variable. It depends upon the number of power sites that are available and upon their comparative cost of development, but considering the large amount of undeveloped power in Western Oregon, and also considering 300,000 horse power at Celilo, I should say that the value of an undeveloped horse-power is very problematical. We have had a great many power sites offered to us in the last three or four years, at values ranging from $2 to $5 a horse-power, and some of them less. And in a case of this kind, where there are other power sites on the western slope of the range that could probably be developed at a less cost per horse-power, the value of this power site, at the present time you understand, would be quite problematical. I would say that it had some value and that it was a fairly good power site, but I certainly would not say that it had any such value as a million and a half dollars.

Q. Well, is there any such difference in the project as contended for, assuming their premise that a 60-foot dam is not available, and that it must be cut down 4½ feet, is there any such possible damage or loss that can result from the curtailment of the construction?

A. I fail to see it. I can't figure out any such value for the loss of 1500 horse-power.

(Testimony of L. B. Wickersham)

With reference to the limit in the cost of construction of a project of this kind at the power site, to make it at all attractive, I know we show very little interest in any power site offered to us that would show a development of over $100 a horse-power. That includes location, land, flowage rights, construction, and everything.

The condition of overdevelopment of power in this territory is general over the Pacific Coast. There has been a very great overdevelopment. They have over estimated the possible use of power. I think it is probably more so in Spokane than it is here, but there is a very large overdevelopment right here in Portland.

With reference to the relative economical practicability of making a partial development or making a complete construction, I would say, in a development of the kind that J. G. White proposed here at Sherar's Bridge, it would involve the construction of a tunnel and a dam and a large part of the original cost of the entire plant before he could supply any power. You would have to carry that along under a heavy interest until such time as you could market the power. Power plants which are capable of flexible development, namely, in 10,000 horse-power at a time, at a proportionate cost, are usually more attractive than those that require the entire investment before you can develop any power or a large part of it. I should judge that in a case like White's plan here, in the present market condition, an interest charge on a million or two million

(Testimony of L. B. Wickersham)

dollars for five or six years might be a burden. You could not market the balance of your power.

Q. You state that you were up the Deschutes Canyon just as the railroads were constructed. Is the construction of railroads reaching this dam site, of any advantage, furnish any increased value to the dam site, or make it more attractive because of the existence of transportation facilities?

Mr. Veazie: We renew our objection that transporation facilities are not a proper offset.

Objection overruled by the court.

A. I should judge the presence of railroads there is absolutely essential to this development. I know that we figure, I would estimate roughly that a plant of this kind would require at least 20,000 tons of freight that would have to be hauled in there. Now, 20,000 tons on a basis of forty cents per ton a mile to haul would run into considerable money, something like $130,000 or $140,000, probably considerably more than that, and that certainly is saved in the construction of this power plant by the presence of the railroads there. Of course, from that you would have to deduct the freight haul on the railroad for the comparative distance, which would be nominal as compared with 40 cents per ton a mile. The lowest contract price that we have ever been able to get on a haul of this kind, and we have had a number of inquiries in connection with our own developments, has been 40 cents a ton a mile, and it ranges all the way from 40 cents up to 60 cents. That is wagon road haul.

(Testimony of L. B. Wickersham)

Of course, on a haul of the class of machinery that you have on a hydro-electrical development, where you have very large pieces and very heavy tonnage of single pieces, you have to have special equipments and you have got to have roads that will hold it, and the maintenance of roads is a very important item. In fact, the Stone & Webster people have virtually come to the conclusion that it is cheaper to build in a construction road themselves, that is, construction railroad, I mean, at eight to ten thousand dollars a mile, rather than attempt to go through the haul and maintain the roads.

With reference to the claim that large quantities of rock would have to be conveyed over the railroad track for construction purposes, there is no reason why the rock from the tunnel should not be used if the character of rock is suitable. We have made a great many tests on the strength of concrete, using the type of rock that we have here in Eastern Oregon, in connection with our development at Clear Lake, where we have a somewhat similar character of rock, and we have found that we could use that rock both for the manufacture of sand and also in the aggregate for masonry. In using it for rock, we found that we could use that material very nicely and it would give us the required strength, and while I have not examined the particular rock at Sherar's Bridge, I should say off-hand there is no reason why you should not use it. It certainly would not be good engineering construction to waste that rock taken from the tunnel, and go into the same mountain and borrow it for the construction. Our Clear Lake development,

(Testimony of L. B. Wickersham)

on a straight line or on the nearest construction line from here, would be about 140 to 150 miles.

CROSS EXAMINATION.

Clear Lake is the lake from which the McKenzie river rises in the Cascade Mountains, between 60 and 70 miles from Eugene. The transmission line would come down the McKenzie River Valley if it came that way. For the first ten or twelve, possibly fifteen miles, it would come down the gorge, but the larger part of the distance is open valley. The power site would be at an elevation of about 2000 feet. The minimum flow of the McKenzie River is 237 second feet. Our project is under serious consideration of development, nothwithstanding the alleged overstocked condition of the market. It is capable of a gradual development, the first unit being about 18,000 horse-power, and we expect to develop in connection with a large part of the use by ourselves, providing our lines are extended south from Eugene. That power will not come into Portland, and it is not contemplated to put it on the Portland market for a long time to come. We could not sell it. We may desire to bring it here ultimately, if we could sell it here at a wholesale price. Of course, we would not think of developing 50,000 horse-power for a long time to come. There would not be any market for it. There is nothing done but the engineering work on that project. I cannot come anywhere near giving you the figures as to what the increase has been in the Portland market in the use of power in the last ten years. I could not say, I don't

know what the increase in consumption has been, whether it may be four times what it was ten years ago or not.

We have a power plant of 10,000 horse power at Spokane. We use flash boards because we are contracting for additional power now which we expect to take care of with our flash boards. We don't use the flash boards unless we need them to furnish as much power as we have demand for. The Long Lake development will be completed in about two years and will furnish 72,000 horse-power. They are building a dam some 193 feet high for that. No one knows where they expect to market that power. Spokane is about 450 miles from Portland, and that power is not accessible to this market.

I think the estimate of plaintiff's engineers of 4500 second feet minimum flow for the Sherar property is about right. I think that would be safer than to take the minimum according to the records of 5000. I think that is a reasonable safeguard. The government reports show that high water has reached the stage of 30,600 second feet in the time the Government has kept a record, which is ten years past, but only four times in the ten years, or an aggregate of 26 days, did it go over 15,000 second feet. The project has to be installed on the basis of taking care of such maximum floods as do occur, even if it be only for a day or two at the time. In my opinion, an allowance of 20 per cent. over the maximum flow shown on the government records, would be sufficient to take care of the floods.

(Testimony of L. B. Wickersham)

The Deschutes River is unusually uniform in flow, more so than any stream that I know of. All the streams I have spoken of on the Willamette Valley side of the mountains have an extreme variation between high and low water to contend with in the installation of power projects, which is a matter of considerable importance. On the Columbia River, where I spoke of a contemplated power project at Celilo, the rise of the river is very high, but I could not tell you the figures. I think the Celilo development is more or less feasible. I think, under the plan that is contemplated, they expect to supply continuous power. The plans are shown there. I am not familiar enough in detail with them to tell you about it. I understand that the government engineers have agreed to the feasibility of such a plan, but I know of no report in which they have said so. There is no development work, nothing done toward the project except that the engineering work is now under way, which is preliminary work to consider its practicability. I don't know much about that project.

Q. Now, as I understand you, it would be necessary to provide some way of taking care of that water if a 60-foot dam were to be installed at that point.

A. Yes, sir.

Q. It is not practicable, then, to build the 60-foot dam at the point in controversy, as that railroad now stands, without providing some special method of taking care of flood waters, is it?

A. Flood waters should be taken care of.

(Testimony of L. B. Wickersham)

Q. They will have to be taken care of by some special method or else a 60 foot dam cannot be built.

A. Yes, sir.

I would consider a 55-foot dam with flash boards on it a 60-foot dam. I don't think that the construction, whether it is wood or steel or masonry has anything to do with whether it is a 50 or 60-foot dam. If it gains the head required it is a 60-foot dam.

Q. If the instructions to an engineer were to prepare plans for a 60-foot dam in a certain location, would he prepare plans for a 55-foot dam and tell them they were expected to use flash boards on top of that, or not?

A. Probably he would if he found he could not put in the other.

If it were required to put in a 60-foot dam there and conditions made it feasible to use flash boards, he would use them in obtaining 60 feet.

Q. Don't they ordinarily, after getting the height of dam they want, use flash boards on top of that anyway if they can gain anything by it?

A. It depends; depends on what you want to use it for.

Q. Isn't the use of flash boards a common device for augmenting the storage capacity and augmenting the pressure, no matter what the height of your dam is?

A. It is very frequently used for that, yes.

Q. Suppose our right was to erect a 60-foot dam there, and we erected a 60-foot dam, then might it not still be desirable to use flash boards on that dam?

(Testimony of L. B. Wickersham)

A. Then you would have a 65-foot dam. When you put the flash boards on you would have 65-foot dam.

Suppose you put a removable section with a curtain on your dam, it would still be a part of your dam just the same. If you raised it 5 feet, you would have a 65-foot dam. Whenever the flash boards were taken out you would lose that much head. I think the loss from the five feet would affect four per cent of your capacity.

Q. And that 4 per cent under the circumstances would be as the engineers figure it, of far less average cost to get than the rest of it, wouldn't it? That is, there are certain expenses, such as the diversion of the river or the installation of a dam or the construction of the tunnels, and so on, that are going to have to be incurred whether we get that extra 1500 horse-power or not, aren't there?

A. Well, I think that basis of reasoning leads you to an absurdity, because that saving would increase per horse power if you took off five feet or more and if you took off five feet more, until you took the whole thing off, and then you would have your plant undeveloped property worth about a million and a half dollars.

Q. No, I think you are taking that backwards. You have your reasoning backwards on it. Isn't it correct, as I stated to you, that the largest items of expense of development are going to be incurred and it will not be diminished at all by the fact that the company developing the proposition doesn't go up the extra 4½ feet. That is, that such an expense as stated, the diversion of the river, which is a large item, would have to be incurred

anyway, this construction of the dams and the tunnels and plant itself.

A. Your own engineer here figures the cost of your dam increases the square of the height. Now, your dam increases as it goes up.

Q. The overhead charges?

A. And your general overhead charge is decreased. Now, there is a point reached, as you estimate the value of the plant, at this time, there is a point reached which is called the economical height, over which to go any higher you will increase your cost per horse-power above what your average should be, so therefore increasing it at a rate of 5 feet at a time up towards the economical height will give you a decreased increment each time as you go up; and likewise as you go down the value of each five feet would increase until you got down to the base, so that your proposition down would be greater than your proportion up.

Q. But the nearer you get to the most economical point the more advantage it is to keep moving toward it, isn't it? That is, there is no loss in going higher until you have passed that point?

A. No loss until you have passed that point.

Q. In fact, each horse-power produced will get cheaper until you have reached that point?

A. That is true in a measure, yes.

Q. And under the circumstances here, do you find that the figures that the engineers give as to the cost of gaining that extra 1500 horse-power are wrong?

(Testimony of L. B. Wickersham)

A. I think that that conclusion leads you to a value—

Q. Do you find those figures are wrong, that is what I asked.

A. The figures are not wrong so far as actual figures are concerned, but the basis of reasoning to arrive at this thing—the premises seem to me to be wrong, in that it leads you to a conclusion that is hardly justified.

Q. Then there is an actual loss to the value of a project from the loss of that 1500 horse-power, isn't there?

A. There is some loss, I should say.

Q. And if their figures are right that amount of power can be developed additional to what could be had by the dam 4½ feet lower at considerable loss than the average cost of the whole project, and it is a serious loss, isn't it?

A. Of course, I have not checked these estimates. I don't know these—

Mr. Spencer: What is that?

A. I have not checked these estimates. These figures upon which the value of the extra five feet are based, are based on two separate estimates, one on 55 feet and one for 60-foot head. And, as you say, it is a question of the cost of the dam and increased cost of the dam as compared with the cost of a decrease proportionately of the overhead charges.

Q. Has it not decreased proportionately a number of other items, too?

A. Yes, other items.

(Testimony of L. B. Wickersham)

Q. Such a diversion of the stream for the purpose of putting in the dam, would be just the same for one height as the other, wouldn't it?

A. Yes, that is right, and the—

Q. And the tunnel construction?

Mr. Spencer: Let him finish his answer.

A. As to the comparison of these, the whole basis or the value of that conclusion depends upon the correctness of these estimates, and it is also a matter of judgment as to what proportion of these expenses will be increased by reason of an increase in height or increase in capacity.

Q. The cost of diversion of the stream would not be increased at all by going an additional height, would it?

A. What do you mean by diversion?

Q. Diversion made for the purpose of putting in the dam.

A. The waterway tunnel?

Q. No, I mean the temporary diversion of the stream for the purpose of putting in the foundations of the dam.

A. I should not think that would be increased very much.

Q. Well, that is one large item. The cost of tunnel construction would be increased very little in taking care of additional flow.

A. There would be an increased head. It would require possibly greater strength of tunnel lining to take

(Testimony of L. B. Wickersham)

care of internal and external stress. Just what that would be would be a matter of computation.

With reference to whether or not there is any danger of the sluice-way clogging with drift, that would be taken care of with the grizzlies.

The use of siphons to take care of flood seasons is very common. It is not common, but it is in use in Europe and other places. I think there is an installation of that kind in use in New York. I could not tell you what its character is but it is given in the testimony by Mr. Kelly, or his report here shows or gives the siphon—the report on file here. A siphon is used to take care of flood waters. It is simply a water way carried over the dam and used like ordinary siphon discharge when the water becomes at a certain elevation. It simply takes care of discharge, because you have the additional pressure—you have the difference in head. You would have the head available on the siphon. It will discharge more than you could discharge under practically no head over a spillway.

Q. You said that you would not consider power projects favorably that showed a greater cost than $100 per horse-power at the power site?

A. No, sir.

Q. Now, that does not include transmission line, does it?

A. Doesn't include transmission line?

Q. The question Mr. Spencer put to you included transmission line. You didn't notice that fact in answering the question did you?

(Testimony of L. B. Wickersham)

A. I believe my testimony stated $100 horse-power at the power house.

Q. Mr. Spencer's question included the transmission line. I wanted to be sure whether you understood that or not. Then that should not be included in your answer?

A. No, sir.

Q. You mean the power developed right at the power house?

A. Yes, sir.

Q. You wouldn't include any transmission or anything further than cost per horse-power making the power right there?

A. That is what my figures were based on, at the power house. You would also, of course, consider the distance of transmission in addition to the cost at the power house in considering any proposition.

Q. Do you know of any projects that have been developed, that have been that cheap coming into this market.

A. Well, I don't. The developments that have been made around Portland, outside of possibly Cazadero developments, have not been what you might call very economical developments.

Q. Do you know of any place where flash boards have been installed as a feature to take care of high water? Aren't they, as a matter of fact, always put in for the purpose of increasing the head and the storage?

A. Well, the places that I have used them have been for that purpose.

(Testimony of L. B. Wickersham)

Q. Do you know anywhere that they have been used as an expedient for caring for high water?

A. I cannot recall just at this particular instant any particular place where it was used under exactly the same conditions that we have here.

Q. Well, then, you don't know of any place where they have been used or are being used for the purpose of caring for the question of high water, do you?

A. Well, at Oregon City, by the removal of those flash boards under the maximum stage of the river, it partly effects the same condition that we have here.

Q. They are in simply to increase the storage and the head, aren't they, when they are put in?

A. Primarily; but they also give you additional protection against high water.

REDIRECT EXAMINATION.

Q. Now, in an undeveloped project, does a horse-power, an undeveloped horse-power of 1500 horse-power have any greater market value whether it is figured at the height of a 60-foot dam, or whether it is figured at low water stage of the river at 715, taking the situation in its raw state, has the 1500 horse-power got any more or any greater intrinsic market value whether it is figured at one foot on the dam or at another?

A. Well, that, of course, is rather a hard question to answer. The value of an undeveloped power depends upon so many variable things. It depends on the other plants that are available. It depends on the market conditions or amount of development, and somewhat, of

course, upon the cost of construction, which in this case, of course, would have something to do with the value of that additional five feet. The general view that I think an engineer would take of a question of that kind, would be that any other power site there was probably, in its latent state, worth a certain amount, and that the additional five feet would practically be taken at the same rate of height for the whole dam, simply considered in its latent state. This additional value is only of any value in case the entire development is carried through, and while it shows from the figures given there a certain difference in value for developing the additional five feet, that is also dependent entirely upon the estimates and upon the class of construction and how the construction is carried through, and upon so many variables that I think it would be a very unsafe thing to draw a conclusion.

J. G. KELLEY, a witness called on behalf of the defendant, testified as follows:

I reside in Portland. My occupation is consulting engineer, civil and hydraulic engineer. I have followed that pursuit a little over thirty years. I have been on this coast about 23 years. I was employed prior to that time in California and in Maine. I have been interested and employed in the construction of some small hydraulic developments but I have made more of a practice on examination and engineering work leading up to power developments, power sites. I am familiar with the Des-

(Testimony of J. G. Kelley)

chutes River from a few miles above Bend down to where Crooked River comes into the Deschutes, and from a few miles above Sherar's Bridge to the mouth of the river. I have made investigations as to various water sites and power sites along the lower 50 miles of the river. I have investigated the Sherar site, the Moody site, and the Government site.

Q. Well, now, Mr. Kelly, from your investigation and your knowledge of the location there, how did the Sherar or the Interior Development Company location compare as to economical development with other sites along the Deschutes River?

A. It would only be fair to classify that with the Moody site. The intermediate sites I didn't have all of the surveys made to the point of making as accurate an estimate as I would for the Sherar's and the Moody.

The Moody site is a little less costly development, probably $3 or $4 per horse-power, than the Sherar site. The diagram on the lower right hand corner of defendant's exhibit C, was placed there at my instigation. It represents the height and time of duration of extreme floods in the Deschutes River. The perpendicular scale, each space represents 1000 second feet flow, and the horizontal space represents one day in time. The high water in each case is marked by the date within the curve, that is, the feet, the highest part of the feet. That diagram covers practically the last ten years. There was one or two years in between that there was not any records kept for the full year. The maximum flood of 30,600 second feet occurred in February, 1907. That continued over

15,000 second feet about seven days. There have been high waters in March, 1910, November, 1909, and December, 1907. There were four high water periods in the ten year period shown. In March, 1910, the high water was a little less than 27,000 second feet. It continued about nine days over 15,000 second feet. In November, 1909, it reached 26,000 second feet and continued about five days over 15,000 second feet. The high water of December, 1907, reached 22,000 second feet and continued about four days over 15,000 second feet. The total number of days in the last ten years when the water was over 15,000 second feet was about twenty-three. The diagram just above, the one referred to, represents the average mean flow for the period of 1897 to 1899, and 1906 to 1912. It was spaced off for a year there, and the mean of each month for several years. The data for this diagram was received from the records of the hydrographic office, a branch of the Geological Survey. The diagram just to the left of the center of the exhibit shows the low curves indicating the daily and seasonal fluctuations of power demand in a typical market. Proceedings of American Institute of Electrical Engineers, November, 1910. That came from the report of Commission of Corporations of Water Power Development in the United States. The black marks across the face of the map, marked FF, EE, DD, CC, BB, and AA, and also the similar marks across the profile at the top of the exhibit, designate cross sections of the river at various points for determining the necessary data to estimate the back flow of a dam at the Sherar property. I

(Testimony of J. G. Kelley)

have estimated this back flow for a 60-foot dam at the point marked on the exhibit "Dam site."

A 60-foot dam at that point, I estimate, will back flow the water up four miles, to a point approximately at AA on the map, near Oak Springs, about a quarter of a mile below mile post 48.

Q. Mr. Kelly, considering the limitation of the complainant's flowage right as located at the south line of the northeast quarter of the southeast quarter of section 9, township 4 south, range 14 east, how high a dam could be built at the dam site designated so as not to back the water beyond that point?

A. That would be the elevation in the surface of the river between the site of the dam and the surface of the river at the point that you describe, this 46 mile post has an elevation of 740, and at the dam 715; that would be 25 feet. That is, a raising of the water 25 feet at the dam would back the water up to the point designated as the limitation of the flowage rights of complainant.

Q. What effect, Mr. Kelly, in your opinion, has the building of the Deschutes Railroad at its present elevation, had upon the power possibilities at the Interior Development dam site?

A. I think it has increased their power capacity about fifty per cent. I figure that the power rights of the property up to this elevation where you would come onto other land, would allow them to build a dam 25 to 27 feet high, and they would have about 34 feet fall between the dam site and the power house which would give them 59 to 61 feet head, that they would have in the

(Testimony of J. G. Kelley)

fall of the river in that distance, and the railroad building up to permit them to build a sixty-foot dam would give them a head of probably 94 feet, so that they would gain a head of 33 or 34 feet by the building of the railroad over their development, which would be over fifty per cent increase of power over and above what they would have had otherwise.

I made a filing for the Interior Development Company in 1906. The best plan of development that I could lay out on the ground, in my judgment, was to take advantage of the high water island some distance upstream from the present dam site, and build a dam in the main stream, and then take out a canal from the island, and carry it down below the Sherar's property, a ways below his house, and then penstocks from there to the power house. That is the development that has been referred to here as the Kelley scheme.

The location shown on plaintiff's exhibit 19 is on the same ground on which I made location. That is about 1500 feet up from the dam site designated on defendant's exhibit C.

Thereupon the witness marked the location at which the filings were made on defendant's exhibit C.

I am familiar with the place where the alleged development work is being made by the complainant in this case. The work is being done about 1500 feet down stream from where the notice calls for the location of their dam. It is not work, in my opinion, that would be done upon the development of a dam at the point which

(Testimony of J. G. Kelley)

they have attempted to appropriate, and it could not be used in the construction of a dam where the notice calls for their development.

I have read the report of J. G. White & Company which has been introduced in this case.

Q. Would the material from the tunnel called for by these plans be suitable, in your opinion, for the construction which would require the borrowing of material, and which they say would cost in addition some money to get to the place?

A. It would not only be suitable, but it would be a business policy to use it. It would be less expensive to use it in the dam. I would not consider it good engineering, or economical engineering policy to throw that away and then borrow material from some other point to bring to the site.

I have estimated the amount of material that would come out of the tunnel and the amount of material that it would be necessary to put into the dam. The dam would take about 30,000 cubic yards of material in construction, and there would be about 70,000 cubic yards of rock excavation in the tunnel. There would be amply enough material from the tunnel to furnish all the material the dam would require.

I figure that the building of transportation facilities in there has enhanced the value of the power site in two ways: One is the advantage and saving of expense in bringing the material to the power site; and another way in wiping out four power sites between there and the mouth of the river.

(Testimony of J. G. Kelley)

The plaintiff objected to the testimony as not a proper element of off-set.

Of course, the railroad will deliver material for the construction of the dam on the site now, whereas before it would have to be hauled by wagon from Grass Valley. I estimate that the amount of material it will be necessary to haul in for this development would be 15,-087 tons, aside from supplies which it would be necessary to take in for the workmen. I estimate it would cost $3 to $4 a ton to transport this material by wagon from Grass Valley. It is a down hill haul from Grass Valley to the dam site. I am reasonably familiar with the location of the grade of defendant's line in the vicinity of the dam site, and with the low water elevation at that point.

Q. Considering the low water elevation to be 715.3, according to the railroad data, is it practicable to construct a dam of the height of 60 feet without interfering with the line of the railroad—defendant's railroad at that point?

A. It is with a properly designed spillway, that is, a spillway that would take care of the flood flow.

It is practicable to design such a spillway to take care of this flow. It can be done by sluice gates, or roller type dam spillway, or better still, by siphon spillway. Also by flash boards. The flash board is used in the summer time at low water, and the only reason about that way would be, you would have to replace it probably every season. All of these are practicable methods and in common use.

(Testimony of J. G. Kelley)

Q. In what distance do you consider the maximum flood of 30,600 feet would be controlled at that point?

A. It can be controlled in a limit of 2½ feet from extreme high and low water, about 2½ feet above the crest of the dam.

I have made a sketch of the plan as to the method in which that can be done. The drawing now produced is a drawing of a siphon dam which shows the cross section two ways, longitudinal section of siphon and cross section of siphon to the crest of the dam. There won't be any flow over the dam at the minimum height as all of the water will be used for power purposes. The minimum flow would be 4,000 second feet. That would be about 2½ feet over a 220 feet spillway. This siphon spillway was first brought out by European engineers, and it has been used in Italy and Germany; and finally it was brought out on the New York Barge Canal with the idea of filling one lock from another. Then they had to put in a lot of spillways along the course of the canal, where they would have streams coming in, and dams, and they devised and worked out this spillway. In fact, the type is a design gotten up by the chief engineer of the New York Barge Canal. The intake is taken down below the water level so as not to be affected by ice and drift. When the water rises up to this height, the siphon will prime itself and you get the effect of the atmospheric pressure on the water, so that you get greater velocity and hence greater discharge. It is an old principle and it has been used right along. We get the effect of 34

foot head on the water to force the water through the siphons.

Thereupon the drawing was offered and received in evidence and marked Defendant's Exhibit A2. Same accompanies this record.

I have prepared figures on this type of dam or spillway with reference to the flood flow of the Deschutes River. The flood water can be taken care of in 2½ feet above the crest level of the dam. The formula for calculating the flow of water on that is similar to the formula for calculating the water of a submerged sluice gate. In other words, with this opening of 5x8 feet over the top of the dam in the lowest cross section of the siphon, under a 34 foot head, you would have as much water going over the top of the dam with that siphon as you would with sluice gates of the same dimensions, with the center of the opening set 34 feet below the crest level of the water. It figures out within one or two per cent of that formula. One siphon will carry 1340 cubic feet per second as designed here, and 22 siphons will carry something over 29,000 second feet; then you have 220 feet of open spillway left, so that if you wanted to extend the siphons clear across the dam, you would have just double that capacity or pretty nearly 60,000 second feet of flood flow that the siphons would carry.

Q. That is, you figure, by building this structure halfway across your spillway, it would take care of the 30,600 second feet flow, and that by extending the structure clear across, it would take care of twice that amount of water. Is that correct?

(Testimony of J. G. Kelley)

A. The estimate to the siphon, 22 siphons at 1340 second feet would be a discharge of 29,480 second feet. The 220-foot overflow spillway, with 2½ foot head, would take care of 3890 second feet. So that with the 22 siphons and the spillway 220 feet long, you would take care of 33,370 second feet in the limit of 2½ feet above the low water crest of the dam. That is, within 62½ feet over the low water level. The siphons as designed cover just half the length of the spillway, and if they were put clear across, the capacity would be 58,960 second feet.

The highest part of the structure would be about seven feet above the crest level of the dam, the low water crest level. The highest stage of the water on such a construction as indicated, would be 2½ feet above the crest elevation of the dam. That is, 62½ feet above the mean low water flow of the river.

I have here a pamphlet showing a photograph of a siphon spillway as gotten out by the New York Barge Canal.

Thereupon same was offered and received in evidence and marked Defendant's Exhibit B-2. Same accompanies this record.

Q. Do you know whether this type of dam has been adopted by J. G. White & Company in the construction of any of its projects?

A. I understand that they have built one on a dam in East Tennessee of this identical type.

Q. Is it of large construction?

(Testimony of J. G. Kelley)

Mr. Veazie: We would like to move to strike out that testimony as hearsay, and object to further evidence along the line until it is shown the witness has some knowledge.

A. The information I got came from the Chief Engineer of the New York Barge Canal that designed these siphons.

Q. What have you to say as to the entire practicability and feasibility of this plan to control the flood waters of this river, without in any way flooding or interfering with the line of the defendant's railroad?

A. This type of construction spillway is not only feasible, but practically can be built, maintained, and operated so that the flood flow will be within a limit of 2½ feet on the crest of the dam, and the flood will be below the subgrade of the railroad.

There would be practically no danger of logs or that sort of things getting stuffed into the siphons. This same type of siphon has been used on the New York Barge Canal where it is 30 degrees below zero, and no danger of stopping up with ice, or freezing up. The fact of it is, if there was anchored ice, or anything like that, the velocity of the water would be such that it would break it to small pieces, and besides that, there is very little ice in the Deschutes River.

Q. Mr. Kelly, you have heard the estimates placed by the engineers of the complainant here upon the diminution in value of this power site by virtue of the elevation at which the Deschutes line is constructed over what it would have had, had the Deschutes Railroad been 4½

(Testimony of J. G. Kelley)

feet higher. What have you to say, if anything, in regard to those estimates?

A. Well, it would just simply mean that they would want to build a dam 64½ feet high instead of 60 feet high. That is the way I would put it. They would increase their power, of course, if they got it, by four or five per cent. But in the operation of a plant where they will have power to waste and water to waste, the small height is rather a fine point to figure on. The water-wheels that they would have in their power house would be operated at probably five-eighths to three-fourths gate at the normal capacity of the generator, and they would have 20 per cent to go on for the amount of water used, and also for head. I wouldn't consider that of material moment, where they have got water and power also to waste.

I have examined the report of J. G. White & Company and the plan of development there suggested. I think the way they have designed it, it is a more expensive development than the devlopment I had planned for that site. Of course, they get more power. They figure there and show a cost of about $350,000 for a dam to get a head of about 60 feet, and then they have $800,000 in tunnel, getting extra head of 34 feet. At the Moody site, there was a difference in elevation between the two railroads, only in that case the Oregon Trunk was lower than the defendant's line. That was planned to be taken care of by putting two sluice gates through the lower part of the dam, and I think half a dozen large gates in the crest of the dam. It was planned in the Moody case

that the people owning the dam should take care of the flood waters. Mr. Moody requested me to make that arrangement, and see if I could. I have prepared a report and estimate covering these suggestions.

The report was thereupon offered and received in evidence over the objection of plaintiff's counsel on the ground that the same was incompetent, as Defendant's Exhibit C-2, and accompanies this record.

Q. Are you familiar, Mr. Kelley, with the power values of power plants in the Portland zone—undeveloped power possibilities?

A. I am quite familiar with the size and the approximate cost of power developments.

As to what they could be had for, I presume that would vary from a small price per horse power up to several dollars per horse power. I heard the testimony of Mr. Wickersham that his company has been offered power sites at from $2 to $5 per horse power. I think I offered him one myself on those lines. There are many good power sites that could be had from $2 to $6 a horse power. That carries with it, in some cases, flowage rights, power rights and all riparian rights.

Q. Do you know of available power sites within the Portland zone which are as close as this that can be had?

A. Probably not as large as that, but powersites of ten to fifteen or twenty thousand horse power, that are as near, that could be bought along about those prices.

Q. Well, what is the fact as to whether or not there are a number, or numerous power sites that are capable

(Testimony of J. G. Kelley)

of development, as accessible to Portland as this Deschutes district?

A. I think west of the Cascade Range I know—I believe—I won't say that I know—I believe that there are at least three power sites that could be brought in for less price per horse power, up to 15,000 or 20,000 delivered horse-power for each site.

I only know, as to the Portland market for sale of power, in a general way. I would state that I am interested as engineer for two power sites that I know they have been trying to find a market for the last three or four years, and that they have not been able to market them—good power sites—for the reason, I presume, of lack of market. That is what the conclusion is. Three years ago we had a power site under option to the Bylesby people, to come into Albany from the Santiam, but after they had made out their surveys and made out an option on it, they claimed that they had to let it go on account of not having market enough to develop it.

CROSS EXAMINATION.

I made a report on this project to the Interior Development Company which appears to be Exhibit 33. That report was based on an examination of the site and the assembling of the data from the different sources mentioned in the report.

Q. I note on page 3 of the report this language: "Generally speaking, the Deschutes River along the lower basin has a medium fall, a rapid current, medium or low fluctuations of raise and fall, a large uniform low

(Testimony of J. G. Kelley)

water discharge, a small flood discharge, a very little, if any, floating ice or driftwood, hard solid rock banks, and river bed, and only a small amount of valuable farming land in isolated tracts along the river bottom. The combination of the above conditions is exceedingly favorable for the feasible construction and maintenance of medium and high dams along the lower section of this river." Those conditions you found actually to exist there?

A. Yes, sir.

There is no farming land or other valuable land that I know of involved in any flooding that might occur from the building of dams at the point in question. The railroads run quite near to the river throughout the whole distance of the flood that would be occasioned by the building of a dam of the height of 60 feet. Between the railroads and the river, in some places, the land is rock formation. In other places it is soil over rock formation, I should judge—usual soil in that country. The distance is small as a rule. Some places it varies from probably right near the track to three or four or five hundred feet away from the track. There might be a question of someone else wishing to take up another power site further above involved in the flooding. I think there is fall in the river that would justify a power site within a few miles above, and I think there is a good site for a dam a little ways above, probably a mile and a half or two miles. Any dam that would be put in there would be simply with the object of creating power entirely by the head that might be secured from the dam itself.

(Testimony of J. G. Kelley)

Mr. Wilson: I would like to object to this line of testimony, your Honor, as immaterial. It is a matter of law. They haven't a right to flood any man's property, no matter how valuable it is, without flowage rights.

Q. I notice on page 4 of your report this statement: "There are several irrigation canals taken out of the river in the plains region that may affect the low water flow of the river, but it is my opinion that a large part of the water taken out in canals over the plains will seep through the porous formation and flow back to the river." That is right, is it?

A. Yes. I built several miles of canals up about Bend, and turned the first water into those canals, and followed them out. They lose a good deal by seepage, outside of what is used for irrigation alone.

Any diversion in the early part of the year for irrigation purposes will be likely to result in a return of seepage later in the season. I estimated that there would be a low water flow of about 5,000 second feet at Sherar's bridge, and low water flow at Bend of 1500 second feet, and that all of it would eventually be taken out for irrigation above about, and one-third of that would return through underground channels so as to make the low water flow about 4000 second feet. The Hydrographic branch of the Geological Survey, after going over it for several years, have determined now that with storage they will get about 4500 second feet below Sherar's bridge.

Q. The conclusion of your report contains this sentence: "I would further state that, having examined

(Testimony of J. G. Kelley)

all of the large water power streams in Oregon, I consider the Deschutes River affords the largest and most economically developed power." That is true, is it?

A. It is true for large developments, to be made on a large scale; that is, to make a full development as your initial development. You might not have market for that, though.

Q. What hydraulic developments have you had charge of, if any?

A. I did some work back in Maine, for the Boardville Water Power Company, as assistant engineer. I put in a small plant of water-wheels, generators, at Winchester, for the Oregon Water Power Company. They put in a dam and some wheels for the Union Light & Power Company up at Silverton. Put in water-wheels for the Hammond Lumber Company at Mill City. Put in water-wheels for an irrigation plant over near the mouth of Snake River.

Q. These were all comparatively small developments, were they not?

A. Yes, those were small developments.

Q. You haven't installed any large development, such as this one, anywhere?

A. No, not of that capacity.

Q. Or anything near that capacity, have you?

A. No, not in the nature of water-wheels. I have built reservoirs and small dams, and construction work that is on similar lines, of large scale. For instance, the concrete work, fortification work, at the mouth of the Columbia River; the rebuilding of the Tillamook Rock

(Testimony of J. G. Kelley)

Lighthouse; other lighthouses, one or two, up on Puget Sound. I built ditches and canals over there at Bend, flume line. Built a ditch at Harrisburg, small dam there, years ago. I put in reservoirs several places—Baker City, Eugene, Oakland; ditch work over at Boise City, Idaho. My work has been all around designing and constructing. I have made a good many power estimates in connection with other engineers, such as James E. Schuyler, George F. Hardy; Schuyler of Angeles, Hardy of New York; Anderson Hydraulic Construction Company, on big installations, where they have carried out designs. I made the estimates on the hydro-electric machinery for the Government power site in between Moody and Sherar's Bridge—report of it. Of course, it has not been built.

Q. Those were simply some preliminary estimates?

A. Yes.

Q. Now, in your testimony yesterday, you stated that you figured the building of the railroad at this site had added 50 per cent, I believe you said, to the efficiency of the site. How do you figure that?

A. I figure that a water-power site is made up of several elements, consisting of the natural fall in the river below your dam, and your flowage rights above the dam. If the railroad is built so as to add to your chance of securing additional flowage rights, and building up to that height, you would gain that much more power.

Q. How were you estimating that by the building of the railroad additional flowage rights had been conferred?

(Testimony of J. G. Kelley)

A. I didn't estimate that they had been conferred, but I estimated like this: That if the railroad had built down on the level, or just a little above the level of the flowage rights, it would wipe out the increased capacity of the plant, and their building up to that height will permit, by securing the flowage rights, of increasing the capacity of the power plant over fifty per cent.

Q. Then you consider that the project is fifty per cent better by the railroad being at a height of 60 feet, provided it permits flowage up to that height, up to its own height? Is that what you mean?

A. Yes, sir.

Q. Now, with regard to the use of the material from the tunnel for the construction of the dam, suppose that only one tunnel is driven to begin with, how many yards a day would come out from that one tunnel heading next to the dam?

A. Probably get from 50 to 100 cubic yards of material out of it a day.

Q. Do you think that amount of material would be sufficient to operate a concrete plant such as ought to be installed for the building of a dam at that point?

A. It is a question whether they would take it in there and use it, pipe it up right out of the tunnel, and then run it from there into the concrete mixers. They might run several weeks in storage there, with that material dumped out, and then run it from there to their mixers by machinery, so that they would have a whole lot ahead.

Q. In other words, if they used the material from

(Testimony of J. G. Kelley)

the tunnel, they would have to store it, accumulate it, in order to have a sufficient supply, wouldn't they, for the carrying on of the concrete work?

A. To a certain extent they would.

Q. When the river is diverted for the purpose of constructing the dam, it would be advisable to make the dam construction as nearly complete as possible in the first year, before high water had to be handled, wouldn't it?

A. You would want to get above the high water mark probably with the foundation of your dam. The chances are they would want to finish the dam the first year.

Q. If the diversion took place, it would probably be on the east bank of the river the diversion channel would have to be carried by, wouldn't it?

A. That would be my way of looking at it, yes.

Q. And that would prevent the opportunity of storage of the tunnel material on that side probably, would it not?

A. Not necessarily.

Q. Then preparation would have to be made for the storage otherwise? It could not be stored on the flat? That is right, isn't it?

A. Yes, that is right.

Probably half of the material, if all the material were excavated from the ends of the tunnels, would go out from the end down next to the power house site. It is logical to assume that.

Q. Might it not also be good policy to run an adit,

and to work from the middle of the tunnel as well, for several reasons, that tunnel not being very far into the mountainside?

A. Well, that would be questionable. I haven't looked into that.

Q. If the situation permits that readily to be done, it would be a good plan, wouldn't it, rather than to carry the material half of the length of the tunnel to get it out?

A. The manner of carrying on that work and everything like that would have to be worked out especially on the ground—your plant, and handling the tunnels, and everything like that.

Q. 50 or 60 yards a day would be entirely insufficient for the concreting plant on such a job as that, wouldn't it?

A. It would if you didn't store a part of the output. I assume like this, that you are going to start work on that tunnel and get pretty well in on the tunnel before you build your cofferdam, and put in your dam, so that you would have quite a lot of material on hand.

Q. When the material is being used in mixing concrete, it is necessary to have the deliveries prompt and right there just when needed, isn't it?

A. Yes, sir.

Q. This siphon spillway for dams, shown in Defendant's Exhibit B-2, is a patented siphon, is it not?

A. Yes, sir, it is patented in the United States, the same as the Anderson type of dam, and the multiple arch dam. There have been over 200 Anderson dams put in.

Anybody desiring to construct that style of siphon

(Testimony of J. G. Kelley)

might have to deal with the holders of the patent for the privilege, if they took just that exact pattern. The principle of the siphon is one that has been known so long, that another design could be made without infringing on that patent. The application of siphons to dams is quite ancient in practice. They have been used a good many years in Italy, quite a few years in Switzerland, and some in Germany; and have been used several years on this New York Barge Canal.

Referring to defendant's Exhibit A-2, the point which I mark "Crest" represents the top of the 60 foot dam. The figure 5.0 just above the curve crest of the masonry, which I have marked as the crest of the dam, indicates the height of inlet 5 feet, where the water is to enter the siphon over the crest of the dam—that is the clearance height between the crest of the dam and the top of the siphon, inside the siphon. There is an opening of five feet high and eight feet wide right over the crest of the dam, and the concrete is built over the top of that.

Q. It will be necessary for the water to rise to that height of five feet before the siphon begins to operate as a siphon?

A. No, sir, not necessarily.

Q. The pipe will not be full until it does, will it?

A. Yes, I think it will. That is the way the estimate is made, as soon as the water reaches up to this height, it will be flowing here so fast that it will fill this part of the siphon here, and expel the air in there, and then the whole siphon will fill right up to the top.

(Testimony of J. G. Kelley)

Q. Then you expect the siphon to fill and operate as a siphon before the water reaches its upper level?

A. Yes, sir. Before it reaches the top of the siphon anyway.

Q. Until it reaches the top of the siphon, there would be an air space above it, would there not?

A. Yes, sir, small air space.

Q. And there would be an air space above it, continuing on the upper surface of the siphon all the way down, would there not, from that point until the water reached that height?

A. When the water gets up above this vent here, then the air would fill from this space up to this water level there. Just as soon as that is sealed, and the water commences rushing in there fast, it will run over here and come out this way, and fill the siphon and take this air with it.

Q. The water will not commence rushing in here fast, however, until the tube below is sealed as well as the tube above, will it?

A. It will come running in fast, yes; it will come in from this 2½-foot head or 6-foot head—it will reach a foot over here, and the velocity there will take that air with it and complete your siphon.

Q. On the contrary, until the space is filled somewhere down the tube full, there will be an indraft of air from below, will there not, as a matter of necessity?

A. Yes, there will only come up to about here.

Q. And the further down the incline the water gets until the siphon begins to operate as a siphon, the greater

(Testimony of J. G. Kelley)

the velocity of the stream on the face of the dam would be, would it not?

A. Yes, and that takes the air with it, so that it exhausts this air in here.

Q. But it increases the space above the water for air to come back, doesn't it?

A. It would if it would work that way, but it doesn't work that way. I mean to say that when the water gets in here, and gets to running down over here, it has a tendency, and actually does take this confined air with it, so that it completes your siphon, and your siphon is filled full of water. That is the same principle that is used on all of these siphon tanks—flush tanks and siphons in general.

You take a large body of water, that you have coming down here in a freshet, and just the moment it gets down here in a confined space, why the current itself, if this is exhausted here, would take the air along with it. It creates a draft. It is the same principle that is used virtually on the draft tubes of water wheels, whereby they can set from 15 to 20 or 23 or 24 or 25 feet above the low water on the draft tube, only the draft tube in that case is sealed.

Q. And it is necessary that it be sealed?

A. It is in a draft tube, but it is not on this siphon with that body of water coming in.

Q. As a matter of fact, in the patented dam spillway which is shown in defendant's exhibit B-2, it is shown sealed at the lower end by the water at the outlet?

(Testimony of J. G. Kelley)

A. Yes, it is shown sealed there.

Q. Well, your plan here does not contemplate the sealing at all?

A. No, it is not necessary.

Q. Now, if, as a matter of fact, the water, when it begins to run down this inclined plane, does by its increase of velocity leave a space of several feet over the water column, clear up to this point, the highest point of the interior of the siphon, then the air has the opportunity, through that several feet of space over and above the water, to come up to the top of the arch, doesn't it?

A. It does not do it. There is no use to asume it. This siphon will work the way it is fixed there, and the way it is designed, and carry it out without sealing this lower entrance. It has been proved out by engineers, and written up in the trade papers or technicals papers, and as a fact it is the best kind of a spillway, the only kind that will operate itself right straight along, be always ready to operate without any mechanical appliances. It is a principle that has been carried out for years and years.

Q. What I am getting at is that until the water rises on the outside to the level of the crown of the siphon on its interior, there is a possibility that it may not operate as a siphon, but simply as a weir or spillway?

A. There is no possibility about it. It is a fact that the water gets in here and seals this siphon here, when it gets up four or five inches above this opening here, where that air vent is, that this will start as a siphon. The water will fill this part from here. The water going over

(Testimony of J. G. Kelley)

the dam there at that height will go out something like that, and fill out this entrance here, and take that air with it, and complete a perfect siphon. And it will operate as a siphon within this limit—take a body of water that I have calculated—until it works down so that air will come through this pipe here, this inlet, and then that will let the air in here, so that your siphon is destroyed, and then the crest of your water will stay at this height, the elevation of your water, and the air will come in here from above.

Q. Have you seen any siphons of that magnitude at work anywhere like that?

A. Not of that magnitude. I built some small siphons on the same principle, little fellows of my own design, that worked out for flush purposes—things of that kind. But in an engineering sense, with our technical papers and technical books, and engineers' reports and estimates, and the carrying on of these different constructions, I do not consider it necesasry that a man shall go and see one before he knows the principles and how to design it.

Q. If it should turn out that the air finds ready passage over the water up to the crown of the siphon until the water rises to a height of five feet, then your siphon system would have obstructed the flow rather than helped it, until the water reached that height, would it not?

A. No, I cannot see it.

Q. If it does not operate as a siphon until the water reaches that height, it will simply operate as a weir until the water reaches that height? Isn't that true?

(Testimony of J. G. Kelley)

A. Well, that is the action of it, is to act as a weir until you get the siphon going, until you create the siphon.

Q. If it does simply operate as a weir until the water reaches that height, the apron and the divisions between the siphons would obstruct the passage of water over it and through it as a weir, to a considerable extent, would they not?

A. In other words, do you mean that you would not get as much water over the 60-foot spillway of the dam with these obstructions in there as you would if you had a clear opening all the way, without them?

Q. That is what I mean, if the siphons do not operate until the height of five feet is reached, if they do not operate as siphons until then.

A. Yes, if it would not operate as a siphon, why, your spillway would be lessened by the thickness of the partitions here between the siphons.

Q. And the apron would also obstruct the current, the apron over the siphon, would it not, of the water entering the siphon tubes?

A. No, I cannot see that. What little loss of friction there would be there would be almost indeterminate.

Q. What would be the thickness of concrete between the siphon tubes?

A. I think it is about two feet.

Q. And in your plan, there would be 22 of them?

A. There would be 22 to take care of a flood flow of 30,000 second feet, or a little over. I mean, including this spillway. If we took care of a flood of double that

(Testimony of J. G. Kelley)

amount, or nearly double, why, here would be 44 of them, clear across the crest of the dam.

Q. If there were 44 of them across the crest of the dam, there would be some 90 feet or 94 feet obstructed by the concrete walls between the siphon entrances, wouldn't there?

A. Yes.

Q. There would also be that overhanging apron forming the crest of the siphon to obstruct the flow to a certain extent, wouldn't there?

A. There would be, on the assumption that the siphon wouldn't work.

Q. Yes, if it simply operated as a weir until there was a depth of five feet, so that the influx of water completely filled the siphon at the upper end; and it would require some head water to force the water into the siphons, would it not? That is, the water will form a small head, a foot or two, before it begins to flow in?

A. No, no. The water will seek its own level there. Of course, it comes down there with some current. But the head required to fill that siphon, as I told you, is so small that it is almost indeterminate. You have a certain velocity of your water that is coming there.

Q. The velocity, however, of the water would be taken off by the apron over the siphons, would it not?

A. No, not necessarily.

Q. It would break the current when it struck the apron, wouldn't it?

A. It might stop the current a little bit, but it would

be such a small amount that, as I tell you, I could not calculate it.

Q. If it should turn out on calculation that it took 1.3 feet of head to move the water into the siphon tubes with sufficient velocity to fill them, and that they did not operate as siphons until that head was attained, it would mean to make them operate as siphons there would have to be a height of water above the dam of 6.3 feet, wouldn't it?

A. No. The proposition is like this: You are assuming something that is an impossibility on that type of dam, and I cannot see what you are getting at, and I don't know how to answer on those lines. This type of siphon has been in use for years, or the principle, and will operate. It is on record, and can be determined from authority, and from places where it has been used.

Q. The only example that you bring is this on your Exhibit B-2, which shows a considerably different style of construction?

A. Yes. And then there is a different style of construction—two or three different styles. I can refer you to the technical paper, the Water Power Chronicle of September 13, 1913, for a description of another type.

Mr. Wilson: Have you that with you, Mr. Kelley?

A. No, I haven't it with me. I can refer you to the engineer's reports of the New York Barge Canal construction for different types.

Q. The main object in installing in that part of the world is to guard against ice conditions, isn't it?

A. No, sir.

(Testimony of J. G. Kelley)

Q. Why is the inlet put so far below the surface in this Exhibit B-2, excepting to guard against ice conditions?

A. It is the general plan. The object of the siphon, as I understood it, is to take care of the flood waters, to keep them from raising to a dangerous height along the side of the canal, and where dams come in and streams come in, and to hold the flow level of the canal, within reasonable limits. There are eleven of these siphons on the spillways on the Champlain Canal, in New York State. There is a description of a siphon by A. L. Adams, some time last year, in a journal—Gas, Electricity and Power—issued in San Francisco; and then there is some in the other engineering papers of the past two years.

REDIRECT EXAMINATION.

The completed Moody project would be about double the size of the Sherar project. As I remember the Moody site, it would have a head of 120 to 140 feet, and this site, as the engineers plan it, I think, is around about 90 feet. So there would be just the difference in the power capacity of the relation of the two heads.

RECROSS EXAMINATION.

The Moody project is not under construction or under way at all that I know of. There is very little fall by the dam, and it is a high dam project. All the head that is to be gained is to be gained by a dam. The dam

would cost more, of course, but you would not have the extra cost of the tunnels. This project would not cost any more in proportion per foot of head than the project that is designed for the Sherar site.

PHILIP H. DATER, witness on behalf of defendant, testified as follows:

I reside in Portland. I am city engineer of the City of Portland; have been such about three months. The preceding year I was hydro-electric engineer with the Forest Service and previous to that for several years I was with the Barge Canal work in New York State, as construction engineer, and also as designing engineer. I am familiar with the New York Barge Canal. There are several spillways, known as the siphon spillway, in use on that canal. I am not sure how many. I am under the impression there are seven or eight. I have seen some of them in operation and their operation is satisfactory. The purpose of the use of siphons on that canal is to maintain the fluctuation of the water service within smaller limits.

ST. CLAIR THOMAS, recalled as a witness on behalf of defendant, testified as follows:

Defendant's Exhibit 35, for identification, is a blue print of the final profile of the Deschutes Railroad as constructed. This exhibit accurately represents the present constructed elevation.

(Testimony of George L. Dillman)

Thereupon the exhibit was offered in evidence and received, and marked Defendant's Exhibit 35. Same being a duplicate of Plaintiff's Exhibit 31.

The resurvey of the line, raising it from the elevation at which it was originally located to the elevation at which it was constructed, was commenced during March, 1909, and finished April 1, 1909.

CROSS EXAMINATION.

Exhibit #35 shows the same profiles as Exhibit #31. It was definitely determined August 25, 1909, by letter from the Civil Engineer, Mr. Boschke, to build the line upon the elevation therein shown. That was the first authority I know of to construct on that line.

GEORGE L. DILLMAN, recalled by complainant, testified as follows:

I heard the testimony of Mr. Kelley on behalf of defendant in this case and saw the exhibits that were introduced in connection with it. Among them is a drawing of a siphon spillway for a dam to be constructed on the site in question. My view is that this structure will not act as a siphon under ordinary conditions. There is a very remote contingency under which it might act as a siphon. The water will rise until it pours over the main part of the structure, and then will flow freely down this slope, gaining velocity as it goes, and thereby becoming thinner, and until the bow of the siphon is entirely filled up, it will not act as a siphon at all; not begin to act as a

siphon. I doubt then if it will have much siphon action because of the thinning of the current here. As the water descends and thins, it will allow the air to enter above the water. The air will force itself into any space of that kind. To operate as a siphon, the lower end of the siphon must be sealed. All parts of the siphon have to be sealed—the upper end, the whole length of the siphon, and the lower end. Otherwise it is not a siphon. It would be possible, under some circumstances, to have the lower end immersed in water, which is the best way to seal it. In this case and with this proposed construction, it might be sealed after the water had passed over the top of the siphon entirely, working in conjunction with the water passing through the supposed siphon, and the two together might seal the outlet so that siphon action would take place. Otherwise it is impossible that this can ever be a siphon.

I do not know of any dam in which it was undertaken to care for the flood water by any such device as that—I haven't any acquaintance with a structure of that sort. The siphon is an eastern device for regulating small ponds, and I have heard of the water being regulated with this in stretches of canal, but the quantity of water passed by these siphons is very small. The principle is the same as the principle of the Miller siphon and other devices for flushing sewers, for the operation of ordinary water closets. For all those purposes the sealing is the important thing, and you get no siphon action without that. It has never been proposed, that I know of, to take care of a very large volume of water with siphons. It is

(Testimony of George L. Dillman)

a very nice device to draw material from a cask with a rubber tube. You form the vacuum there by putting a tube in your mouth and sucking it up until you get the wine in your mouth, and then by pinching it and lowering it into a glass, you get a glass of wine. But on a large scale it has never been done. An overflow spillway is the simplest, most direct, cheapest, most satisfactory method of taking care of excess water in a mill pond. The spillway is preferably put at some point apart from the dam, but in many cases the spill is over the dam itself, the main structure.

I have been connected with tunnel construction for many years. In the last two years I have had charge of the construction of 16 tunnels, the longest of which was 7000 feet, and while not as large as the tunnel proposed here, they were large enough to be comparable. Tunnel construction is the proper thing here for the main conduit from the reservoir to the power house. It is very satisfactory in operation and there is nothing against it. In first cost it may be a little bit more than some other device, but when upkeep and operation are considered, it is the cheapest device to use in this case. This tunnel is apparently in uniform material, basaltic, and in looking over the ground and considering the method of development, I thought one or possibly two adits would be proper to work these tunnels, giving the additional faces for work. An adit is a lateral tunnel to one side, just used for construction, and to get at the tunnel proper to take care of material. Another device would be a shaft to reach the same point, or an incline. The adit would be horizontal.

(Testimony of George L. Dillman)

Either one-fourth or one-sixth of the material from the tunnel would probably come out at the dam site end. Ordinarily the rate of delivery from tunnel excavation would not be suitable to afford the supply for the construction of the dam, so far as rock for the concrete is concerned. The material from the tunnel would probably be thrown into the dam if the construction were going on at the same time, but the material would not be used otherwise by reason of the proper method of handling the work. If you tried to get your principal material from the tunnel, the interference of the tunnel crew with the concrete crew would make it very expensive. You would not do it. Ordinarily the rate of excavation would not be sufficient to afford the material necessary. I don't think it would in this case. You would establish a concrete plant at one point, and you would quarry the material for that, and locate your rock crushers in a convenient place to handle your material to your mixers, and operate it largely by gravity. The attempt to use the tunnel material, or all of the tunnel material, in this dam construction would be very expensive. You might start with that but you would not continue it very long.

I do not know of any case where flash boards are used for the control of floods. Flash boards are a device for increasing the pondage and head of a stream at low water, and I know of no cases where they are used for anything else. The attempt to use flash boards in this case would necessitate a very expensive construction, with facilities for operating from the shore end, whereas the ordinary flash boards are slight temporary

(Testimony of George L. Dillman)

things, that are put on by men going out on the dam, and they are swept away with the next flood, and a fresh flash board put up the next season.

CROSS EXAMINATION.

I heard the testimony of Mr. Dater to the effect that siphon spillways are in successful operation to control the flood of the New York Barge Canal within limited area. Those siphons are properly designed, however. They are not the siphon that Mr. Kelley drew. I think it is physically possible to build siphons at this place to take care of that water without interference with or flooding the tracks of the defendant company. I have seen some reports of the construction superintended by J. G. White & Company in Tennessee, recently completed, and more or less advertised, in which the siphon spillway is used on a large scale. That is a smaller installation than this. I think you can build a siphon at this point that will be physically sufficient. It will cost a great deal of money.

Q. Mr. Dillman, do you mean to say that it is entirely impracticable to raise that water and maintain it at a 60-foot elevation by the use of flash boards at this point?

A. It is impracticable to maintain the height of that water within small limits.

Q. You disagree, then, with Mr. Wickersham, with Mr. A. Welch, who said that that was his intention, expressed at the time, determined upon and expressed at

the time that the maps were before him? You say that his idea then was entirely impracticable?

A. I do.

Q. Do you mean to say that Mr. Wickersham's testimony as to using the flash boards for this identical purpose at Spokane is impracticable?

A. I don't know just what the plans at Spokane are. If you build and operate flash boards at flood times, the construction must necessarily be very expensive, and they must be operated from the shore ends, by probably some hydraulic means.

They will possibly have power at that point. They can transmit it there.

Q. As a matter of fact, they could use that power to operate it the one or two times in ten years that it would be necessary to operate it?

A. Yes; but it would be cheaper to raise that railroad than it would be to build that construction.

I have examined, in a general way, the contemplated plans of the Celilo improvement for handling the flood waters at that point by removable section of the dam.

Q. Will that method of procedure control the flood waters, or could it be adapted to control the flood waters at this point?

A. I regard that proposed development as entirely impracticable.

Q. Mr. Dillman, if you were employed as an engineer by these complainants at the present time, with the railroad located at that point as now located, and they advised you that they desired to construct a 60-foot

(Testimony of George L. Dillman)

dam at that point, without flooding the tracks of the railroad, would you say that "It is impracticable, and I cannot do it?"

A. I would say it would cost a great deal of money, and it would be advisable to do something else; that it would be advisable to either raise the railroad or cut down the height of the dam; that under-sluices, siphons, and flash boards are not a proper device to use.

Q. Then, you think the testimony of these witnesses here to the effect that that can easily be done, and especially the testimony of Mr. Wickersham, an electrical engineer of the Hill interests in this territory, that it is a comparatively simple matter, and could be done with no additional cost, is not true? Is that correct?

A. If he said it could be done with no additional cost, it is absolutely incorrect.

Q. He said practically no additional cost.

A. It is absolutely incorrect.

REDIRECT EXAMINATION.

Q. Do you believe that any siphon will work there successfully which does not extend down into the water below so as to seal the lower end against the entrance of air?

A. That is the best method of sealing the lower end of the siphon, and that must be sealed for operation.

(Testimony of G. A. Kyle)

G. A. KYLE, recalled for complainant, testified as follows:

I heard the testimony of Mr. Kelley as to his siphon plan for caring for flood water on this dam, and have seen the drawing that he furnished on that point. I think it is possible to build a siphon that will work there. Of course, it will cost some money and all that, but I think that Mr. Kelley is probably in error in the height of the water that he will raise over the dam. It is my opinion that the siphon will not operate as a siphon fully, that is, you won't get full efficiency until the water is five feet above the crest of the dam, and it fills up the intervening space between the crest of the dam and the top of the siphon. You will not get siphon action until that is accomplished. I should say after the water got up to that height, it would still rise higher on account of the velocity—the head that it would have to have to force the water over the crest of the dam. It would take about nine-tenths of a foot theoretically, actually probably about 1.3 feet, which would require a depth over the top of the dam of 6.3 feet total. Up to that time the siphon system would decrease the amount that would go over the open weir.

Q. That is to say, less water would flow through the siphons than over an open weir, until that depth was reached?

A. Yes. I should say after that depth was reached, the water would begin to fall, and probably get down to where Mr. Kelley figures.

(Testimony of G. A. Kyle)

I figure that the siphons would cut off—there are 23 walls that separate the siphons and the walls are two feet wide, which would make 46 feet; subtracting that much from the length of the weir would leave 394 feet; and a weir 394 feet long and 5 feet deep would carry approximately 14,600 cubic feet per second. In that case, if that is so, that would make an ordinary flood almost as disastrous as a big flood, because it dams up the weir until the siphon begins to work.

Q. That is to say, if I understand you, it would cause ordinary floods, up to 14,000 second feet, to raise the water to a height of six feet and a fraction?

A. Yes, sir.

Q. Over the dam, as you estimate it. Have you estimated the cost of construction of these siphons as an added feature to the dam, Mr. Kyle?

A. Yes, sir. I estimate that this plan that Mr. Kelley has, would add 1875 cubic yards to the yardage; at $15 a yard would make it in the neighborhood of $30,000 for the 22 siphons.

That would have to be probably steel and concrete construction; reinforced concrete or steel. If there was any cracking or imperfection of the work, the siphons would not work—they would not work unless they were air tight, of course. If the siphons were made to extend clear across the dam by doubling their number, it would double that estimated cost. If the siphons were extended down to the pond instead of stopping at 34 feet down, that would add considerably to the cost—whatever the masonry would be.

(Testimony of G. A. Kyle)

Objection was thereupon made to the testimony as to the additional cost, on the ground that the same was immaterial; that the parties undertook to look after that, and the Deschutes Railroad Company got its line at a point that was satisfactory to the complainant until after its line was constructed, and the question of additional cost is one for the complainant to take care of. If it is possible to construct such a structure and maintain their head, The Deschutes Railroad Company's elevation would be a proper one and the testimony is immaterial.

I have had experience in tunnel construction on the different railroads that I have been in charge of. On the Milwaukee we had one tunnel 8400 feet long and one through the Cascade Mountains about 14,000 feet long, and probably 30 or 40 smaller ones.

Q. How many yards of rock could be removed per day, under good working conditions, from the dam site end of one of the tunnels as planned in connection with this power site development?

A. It would be about 12.2 yards per lineal foot of tunnel in the construction, and possibly, under favorable conditions, they might move probably from six to eight or nine feet a day.

I should say that the number of yards that could be removed in the course of such work would not be sufficient to supply the rock for the concret wrok in progress on the dam. The place where the tunnel rock would come out would not be the most available place because you would want to put the rock crushing plant

(Testimony of G. A. Kyle)

where you could crush the rock and mix the mortar. You would want it up so that you could run it through pipes by gravity into the dam. Naturally they would build one tunnel first and the other later. If they built half of the tunnel from each end, there would be only half of the material at one end. If they put in an adit to the side, there would probably be one-fourth of it. The amount to come out of it at the dam site would depend on the plan of construction adopted in connection with the tunnel.

CROSS EXAMINATION.

I did not say that the water would have to rise five feet before the siphon would begin to work. I said before it would start to full efficiency. All that is necessary is to fill the siphon and get enough head to fill it.

Q. You think this space is sufficient to take care of the flood waters if you get your siphon full?

A. Yes, sir.

I was associated with Mr. Wickersham. He is a competent man in his line. I should say that he is all right and so looked upon by the interests that employ him.

Q. Did you hear the testimony of Mr. Wickersham that the method of taking care of this by flash boards was practicable and feasible, and would not entail any additional expense over and above what a full masonry dam would be at that point?

A. Well, I didn't hardly understand him to say

there wouldn't be any additional expense. I didn't understand he said that.

I guess it is so that it would not cost any more to build a masonry construction to a height of 55 feet and flash boards of five feet, than the full masonry construction of 60 feet.

Q. And you think that that water could be controlled in a practical manner in that way, do you?

A. Assuming that those did work, it could be controlled, I should say, yes. But it is not desirable. You are always taking some chances. And, as I say, you are liable to make a small flood as dangerous as a big one.

Q. I am talking about Mr. Wickersham's testimony now with regard to the flash boards.

A. Well, looking at it in that view, the difference between building a five-foot dam and putting flash boards on, probably would be about a stand-off.

Q. And you could maintain your head in that manner, could you not?

A. No. I wouldn't say that.

Q. Well, couldn't you maintain your head in that manner?

A. That would be expensive operation and not very satisfactory, I should think?

Q. Well, would the head be maintained there in that manner?

A. It could be, yes. It could be, but not satisfactorily.

Q. Mr. Kyle, if the problem were presented to you

(Testimony of G. A. Kyle)

to go up there and construct a dam 60 feet high, so as to maintain that water at the elevation and take care of the flood waters, with the lines as they are today, would you consider it an insurmountable problem?

A. Well, Iwouldn't want—I don't believe I would want to take the chances of building a dam there, if I had to stand the damages.

You might construct a plant there that would operate and again you might have a lot of additional expense; that is, damages and so on. When a person actually has to take his chance, sometimes he will, but I don't think it is right to make a person take that chance when it is not absolutely necessary.

Q. Now, in securing this rock material from the tunnel, you could start your tunnels soon enough so as to have your rock out in sufficient time to provide for your cement plant, couldn't you? Don't you very often construct your tunnels before you build your railroad, as a matter of fact, so as to co-ordinate your work?

A. Assuming that you could have the material out there, if you did pile it up there, you would have to pick it up again and elevate it up to where you mixed the mortar, and deliver it to the dam.

Q. And do you mean to say, Mr. Kyle, that if the railroad were not there, you would waste all this material from the tunnel, and then go and quarry some more out at another point, and run it down into the dam?

A. Well, it would be just a matter of expense, whether it would be cheaper to lift that up or take it out of the hillside higher up; whichever was cheaper.

(Testimony of G. A. Kyle)

Q. And as to the furnishing of rock with sufficient speed, certainly the rock could be furnished from that tunnel with sufficient speed to supply any demand of energy that has been shown there up to the present time, couldn't it?

A. Well, nothing has been done there in that line at all as far as that goes.

Q. Isn't there a $14,000 structure that they have been working on continuously for the last four and a half or five years?

A. No, I don't think they have been working on any structure.

I have seen that pile of rock there in the river. I do not consider that part of a dam. I don't think it was intended for one. I was not misled by it. I would not consider the pile of rock as worth $14,000.

Q. If you were constructing a structure of this kind, Mr. Kyle, and work like that was turned in to you for $14,000 worth, what would you think? Would you think you were getting your moneys worth?

A. If I simply got the pile of rock, I would think I was being stuck.

Q. Would you say there has been continuous work done on that since December 8, 1908, to the present time?

A. Oh, I think probably there have been men there on the work all the time. I always understood that they were just simply cleaning off the rocks there for the foundation of the dam.

(Testimony of G. A. Kyle)

Q. For five years and a half that they have been doing that work all the time?

A. Well, they have had a few men there—one or two men.

Q. Would you consider it reasonable work to take five years and a half to clean off the rock to construct a dam at that point?

A. Well, if one or two men do it, they cannot do very much in a day, you know. It takes a good while to do it.

Q. You wouldn't think they were working in very good faith if they only employed one or two men to do that work, to construct a dam, and continued them there for five years and a half, would you?

A. Well, I don't know how to answer that question. It would depend on circumstances.

Q. You were just referring to Exhibit 17. I will now show you Defendant's Exhibit 28, and ask you if that, in your opinion, shows reasonable diligence in four years and a half work of that kind—the difference between those photographs?

A. Well, it just depends on the object of what they are working for.

Q. If you were just working to attempt to hold a dam site, why, you think it would be reasonable?

A. I don't think—

Q. But if you were really working to construct a dam, you would think it was unreasonable?

A. I don't think it is necessary to build a dam to hold the site in the first place.

(Testimony of G. A. Kyle)

Q. What?

A. I wouldn't say it was necessary to build the dam actually to hold the rights, probably.

REDIRECT EXAMINATION.

I was engineer in charge of the construction of the Oregon Trunk Railroad and had the problem confronting me of going up to such a height as to admit of building a 60-foot dam. We decided to raise the road to the height that we thought would make us safe for any possible high water there might be there.

RECROSS EXAMINATION.

We figured together with the predecessors in interest of the plaintiff as to the location of our line.

Q. If you had gone to them, and your line was 64½ or 65 feet above low water flow at the time, and they, looking at those maps and understanding that that was 64 or 65 feet above low water, said it was sufficient, you would have considered it was sufficient, wouldn't you, and that they would look after the flood water?

A. No, sir.

Q. Not even if they said it was for their purpose, and that they would look after the flood waters?

A. If I were going to build a dam there, I would build it higher than that surely.

Q. You wouldn't take a chance on their own statement?

A. I wouldn't take a chance on it. If I were re-

(Testimony of Walter S. Martin)

sponsible for the damages, I wouldn't take the chance, no, sir.

WALTER S. MARTIN, recalled for plaintiff, testified as follows:

I heard Mr. Morrow's testimony in regard to the meeting with me on the train between Salem and Portland. I told Mr. Morrow, as well as I can recall, that we had concluded the purchase of the Sherar property.

Mr. Wilson: At the time of this conversation on the Salem car?

A. Yes. That we were the purchasers. I don't remember the exact words.

Q. Now, I would like for you to tell the court what Mr. Morrow said to you, if anything, about his agreement with the Sherar Estate representatives.

A. To the best of my recollection, Mr. Morrow didn't tell me of any arrangement that he had made with the executors of the Sherar's Estate.

Q. Any of the representatives of the estate at all?

A. Or any of the representatives.

Q. Did he say anything to you about having any talk with Mr. Grimes or Mr. Huntington in regard to that matter?

A. He did not, as far as I can recollect.

Q. He states in his testimony that he outlined this agreement to you, and that you said that the agreement was entirely satisfactory to you. Now, what is the fact in that regard?

(Testimony of Walter S. Martin)

A. Mr. Morrow, to the best of my recollection, did not refer to any arrangement or agreement that he had with the Sherar Estate, or their representatives, and did not outline to me any agreement that he had with them.

Q. Did you say to him that this agreement was satisfactory to you?

A. I did not.

Q. As a matter of fact, Mr. Martin, if he had told you what he testifies on the stand he did tell you that occurred between himself and the representatives of the Sherar Estate, would that have been satisfactory to you?

A. It would not.

Q. Now, do you recollect whether Mr. Morrow ever said anything to you about agreeing to pay $1000?

A. I never heard of this agreement, as having been passed up to me and being agreed to by me, until the time that the injunction was applied for and I was asked to make an affidavit in response to an affidavit that was made by Mr. Morrow.

I got the information from you by wire and by letter. This was the first information I had that the Deschutes Railroad Company claimed that they had communicated to me the terms of an agreement made with the Sherar representatives, and that I had consented to the terms which have been referred to by Mr. Morrow as $1000 for the right of way, and such a right of way as he referred to.

Q. Mr. Morrow says he remembers particularly about this $1000 feature because of some little talk about

(Testimony of Walter S. Martin)

their paying John Wilcox some money. Do you remember anything about it?

A. I testified the other day about the questions that involved John Wilcox. I had given them the right of way at the mouth of the river over the company's lands, which I believe covered the larger part of nine miles, and which was quite a valuable right of way as compared with what they were paying in the neighborhood. I was anxious there, for the protection of the dam site near the mouth of the river, to have them go at what was a very considerable height, and a very great deal of difficulty, on account of the fact that they had to turn in from the Columbia River on a switch that was almost a switchback, and we were in litigation with Moody over a contract covering those lands, which made it somewhat embarrassing. I knew that they had gone to Moody to ask him, as far as his interest in the property was concerned coming through this contract which he claimed was in effect, and which we claimed we had rescinded, and I didn't want to complicate the situation in regard to the litigation that we were having with Moody, and I recognized the difficulties of the railroad's location there, and I gave them this right of way, without any cost to them of any kind, as far as I remember. When I had done so—I know John Wilcox, and he has been in the real estate business here, though never in our employ, and I asked Mr. Morrow, as a mere gratuity to John Wilcox, to give him $500. You heard what Mr. Morrow testified to the other day, that it was quite impossible for the railroad company to give a donation

under those circumstances. They apparently could accept them, but they could not give them. However, when the question came up finally, I asked Balfour, Guthrie & Company, who were delivering the deeds to the Deschutes Railroad Company, to take it up with them. They declined, and I dropped the matter.

Q. Did that have anything to do with any talk you ever had with Mr. Morrow regarding the location of the road over the Sherar property?

A. It had nothing in the world to do with that, except Mr. Morrow said, when I told him we had completed the purchase of this property, or were prospective purchasers of it, that he hoped we would be able to arrange the right of way at the Sherar property as amicably as we had at the mouth of the river, and I said I hoped we would.

Q. I mean the talk about John Wilcox, did it have anything to do with the Sherar Estate?

A. Nothing to do with the Sherar Estate in any way at all.

CROSS EXAMINATION.

Q. Mr. Martin, when did Mr. Mackenzie, of Balfour, Guthrie & Company, advise you of these floating rumors that he testified to on the stand that he had heard as to Mr. Morrow's understanding that he had an agreement with you to go upon the land and construct the railroad?

A. I have gone through the correspondence addressed to my office by Balfour, Guthrie & Co. from

(Testimony of Walter S. Martin)

here. I have communicated with my office in San Francisco, and asked them to examine the files of any correspondence covering the period from the first of August, 1909, until the 30th of April, 1910, to see if there was any letter from Balfour, Guthrie & Co. or Mr. Mackenzie, or Mr. Morrow, or the O.-W. R. & N. Company, or anybody else in question, in which any suggestion was made that such a statement was being circulated, and I know from my own examination of the files here, and I have been advised from San Francisco that they find nothing referring to that from anybody, from any source, until this letter from Mr. Minor.

Q. Mr. Mackenzie testified on the stand that he did not write you a letter, but that he, on your next visit to Portland, communicated it to you, and discussed the matter with you. Now, when was that?

A. My next visit to Portland, as far as I can remember, is the visit I paid in March, immediately after I got the J. G. White report, and I came to communicate with Mr. Morrow as to what that report stated as to the power possibilities of Sherar's Bridge.

Q. Is it a fact, Mr. Martin, that you were not in Portland from the 27th day of August, 1909, until the 30th day or this date in March that you have just given?

A. No.

Q. Well, what dates were you here in Portland after the 27th day of August, 1909, and up to March, 1910?

A. I was here—I cannot tell you exactly how long —in December.

(Testimony of Walter S. Martin)

Q. Were you here at all between August 27th and December?

A. No, as far as I recollect, I was not.

Q. You were here, as a matter of fact, on the 27th of August, 1909, were you not, Mr. Martin?

A. No, I was not.

Q. When did you leave Portland?

A. I left here on the 25th or 26th; I think on the 26th.

Q. Of August?

A. Of August.

Q. And do you mean to say, Mr. Martin, that you did not know that Mr. Morrow was claiming that he had your consent to go upon that land?

A. I did not.

Q. Where did you get the information, Mr. Martin, to instruct Mr. Whistler to go to Mr. Boschke to get the height of this dam?

A. As soon as we had concluded the arrangements for the purchase of this property, the first thing I did was to examine the situation with regard to the proposed railroad locations. First of all, I wanted to know what the railroads proposed to do; and secondly, I wanted to know what effect it had on a possible power development at Sherar's Bridge. So I immediately had Mr. Whistler undertake this matter. I believe, as well as I remember, there was some delay in his getting the maps and getting the information.

Q. That was in September, 1909, was it not, that

(Testimony of Walter S. Martin)

you arranged with Mr. Whistler to go and get this information and determine that height?

A. I am not sure but what it was before I left here in August that I told him, or endeavored to have him make arrangements with Mr. Boschke. I am not quite sure about that. But in September he was definitely instructed to go.

Q. And he did go?

A. He did go.

Q. And he made a report to Balfour, Guthrie & Company, or to you in care of Balfour, Guthrie & Company, on October 6, 1909, transmitting these maps and the profiles, and telling you that he did not think the line was over 60 feet? Isn't that the fact?

A. I don't remember the exact words of his report; but it was, as I remember it, that after some delay he had been able to get a profile and a location map; that in going over the matter with Mr. Boschke, Mr. Boschke was not able to tell him what the water grade was, and he could not therefore say what the difference between the railroad location and the water was.

Q. But in that report of October 6th, he said, "From data in my possession, I do not think the line is over 60 feet above low water," and that in order to determine that fact a man will have to go upon the ground and determine, didn't he?

A. He may have said that. Isn't the report in evidence?

Q. Yes. You had that information?

A. Yes.

(Testimony of Walter S. Martin)

Q. You never made any objection or protest to the railroad company until March, 1910, March or April?

A. I didn't, no. I followed that up by employing J. G. White to examine the situation. I do not believe Mr. Whistler's report was a definite one, was it, Mr. Wilson?

Q. It is very definite. It is in evidence.

A. But did he have the water level from Mr. Boschke?

Q. No, he said he had data in his possession, from which he says he thinks the elevation of the road is not over 60 feet above low water.

A. It was not very dependable, was it?

Q. He said in order for you to determine that fact, it would be necessary to go upon the ground, didn't he?

A. I think he did. A man should be sent to the ground, yes.

Q. Did you send any man upon the ground to determine that fact?

A. I think a man did go up there and actually run a survey.

Q. And when was that, Mr. Martin?

A. I cannot tell you.

It appears from the map to have been made in September, 1910, a year later, and after this suit was commenced.

Q. Now, did you send anybody onto the ground in response to Mr. Whistler's recommendation that somebody go upon the ground?

(Testimony of Walter S. Martin)

A. I was under the impression, Mr. Wilson, that that map was the result of a survey, but I was mistaken in the matter.

We have Mr. Hammett's map made after January, 1910. We were negotiating with J. G. White to get a man out there some time before he came.

Q. Mr. White's testimony is to the effect that he was employed about January 10, 1910.

A. He is perfectly correct.

Q. And that was considerably subsequent to this time?

A. No, we tried to make arrangements to get some one out here a good deal preceding that, but we could not get any engineer from J. G. White; and when the engineer came he actually arrived in Portland January 10, and went out to the Deschutes.

Q. When you were up here in December, 1909, which I understand was the next visit after August 27, 1909, when you were in Portland did Mr. Mackenzie tell you of the understanding which Mr. Morrow claimed to have?

A. As I testified, I never heard that the Deschutes Railroad Company was claiming that I had agreed to give them a right of way through these premises, in conformity with the statement that has been made as to the understanding that Mr. Morrow and Mr. Grimes had, until this question came up in connection with my affidavit.

Q. Did you understand that the Deschutes Railroad Company was claiming, in December, 1909, that

it had gone up there and was constructing its line by your consent and authority?

A. I did not.

Q. Didn't Mr. Mackenzie communicate that fact?

A. He did not.

Q. Didn't he send you a copy of that letter of Mr. Huntington to him of August 27, 1909?

A. August 27th?

Q. Yes.

A. I never saw that letter until I saw it in Mr. Huntington's letter book the other day.

Q. Mr. Mackenzie was looking after your interests in this territory?

A. Balfour, Guthrie & Company. Mr. Mackenzie is connected with the firm.

Q. Mr. Mackenzie is in charge of that part of the Balfour, Guthrie & Company work is he not?

A. I don't know the internal economy of Balfour, Guthrie & Co. Mr. Mackenzie is the man I generally saw.

Q. He has been for a number of years looking after your interests in this territory?

A. Balfour, Guthrie & Company are our agents.

Q. I mean, as employed by Balfour, Guthrie?

A. I don't know how they apportion their work there. Mr. Mackenzie is the man I generally talked to.

Q. You didn't get any information at all from the railroad company that induced you to employ Whistler, and tell Whistler to go to Mr. Boschke? Is that correct?

(Testimony of Walter S. Martin)

A. I employed Mr. Whistler after we had taken these contracts to buy the property, for the purpose of determining first of all—Mr. Whistler's first employment was to go and see Mr. Boschke, and get such information from Mr. Boschke as to their proposed plans as he could get, and then to advise us of that; and I think that his next employment—or whether he was employed to do that or not, I don't know, but the next employment was, the next matter was, to determine what the effect of the railroad's proposed plan was on proposed power development at Sherar's Bridge.

Q. Mr. Whistler's testimony is to the effect that he received from you, or from the Eastern Oregon Land Company, information that if he went to Mr. Boschke he could secure such data. Now, where did you get the information that Mr. Boschke would give it?

A. As I tell you, I am not quite sure, but I think before I left here in August that I spoke to the railroad people about that matter, and if I communicated that to Mr. Whistler, it was on the basis of what they told me, that Mr. Whistler could go there and get the information.

Q. The railroad company was willing and offered at all times to give you anything they had?

A. They offered to give me information, yes.

Q. Full information, whatever they had?

A. It was a question. Can you tell us what you propose to do when you get to Sherar's Bridge?

Q. You were on perfectly good terms there? You were dealing with regard to the lower site, and they had

given you all the information they had, and they were doing the same in regard to this?

A. There was no question at the lower site of anything at all. We told them at the lower site what we would do. I have explained why I was anxious to have it done at the lower site. This is an entirely different proposition.

Q. They offered, however, to give you whatever information they had?

A. They offered to give us the information to indicate what their proposed location was. That is all we asked them for.

Q. And they did, and that was transmitted to you on October 6th?

A. Some time in October.

Q. Now, Mr. Martin, you filed a similar suit to this against the Oregon Trunk Railroad, didn't you?

A. We filed suit against the Oregon Trunk Railroad, yes. I think—weren't they joined, the two companies?

Q. Now, in both of these suits your complaint was to the effect that those lines interfered with your building over 60 feet? Isn't that correct?

A. I don't remember the terms of the complaint.

Q. Well, wasn't that your contention—that these lines prevented you from going higher than sixty feet, and that you wanted to go to 105 feet?

A. I would have to look at the complaint to be able to answer that.

(Testimony of J. R. Thompson)

Q. That was your contention at that time, wasn't it, Mr. Martin?

A. I will take your word for it, if you say it was so.

Q. That is what the complaint says, and I have offered one of them in evidence. I think that is all. I would like, however, to get the complaint in the case of the Eastern Oregon Land Company v.——

Mr. Minor: It is admitted, Mr. Wilson, so far as that is concerned, it is admitted that the complaints in the two cases are very similar. It is not against the Oregon Trunk at all. It is against a man named Griffin. I wrote both complaints. I didn't get Mr. Martin to verify either of them. I prepared them from such information as I had at the time.

The commencement of these suits was authorized by the Eastern Oregon Land Company.

J. R. THOMPSON, recalled on behalf of plaintiff, testified as follows:

There is a deposit of sand at the mouth of White River, and on the Deschutes River opposite the mouth of White River. There are unlimited quantities of sand and gravel to be obtained. This sand and gravel was used in the construction of the dam and power house of the Wasco Warehouse & Milling Company's plant on White River.

I heard the testimony of Mr. Kelley on behalf of defendant in this suit, and have examined the siphon plan for caring for the flood waters at this dam. The

siphon as provided in the plan of Mr. Kelley is not sealed at the bottom, and you could not force enough water through it to seal it at the bottom. As an example, if the backwater, or the water going over the crest were five feet high, which would come up to the top, that would discharge about 35 or 36 second feet per foot width over one foot wide of spillway, and at the bottom 34 feet. At the end of the siphon this water would have a theoretical velocity of say 48 feet per second, which would make the thickness of the water there less than one foot, that is, the sheet of water at the foot of the siphon would be diminished to one foot in depth on the face of the dam.

I have been connected with plants where draft tubes were used on water-wheels. When the lower end of the draft tube becomes unsealed by the receding of the water at the lower end, the wheel would lose its power by reason of the discharge of the water through the wheel being checked, that is, it would lose its suction. In the case of Mr. Kelley's siphon plan, the effect would be the same, only more so because it is entirely open to the air, and just full to the crest going over. This sheet of water would be only one foot deep—less than one foot in depth—unless it were made very rough or something of that sort at the end of his siphon. If corrugation should be put on, or obstructions to spread the flow in the siphon channel, that would perhaps make a perfect vacuum, but by reason of friction it would decrease the efficiency of the apparatus. I do not regard the Kelley plan of siphon as practical to take care

(Testimony of J. R. Thompson)

of flood waters on a dam at this location from an operating standpoint. It would mean enormous expense for gates and maintenance, expense at certain times in the year in keeping those racks clear. At White River, where I am somewhat familiar with the operating conditions, they have quite a lot of ice coming down, and they would have to work with those, keeping the racks clear, as holes large enough to permit the passage of ice would allow brush or trees or other debris to enter the siphons.

CROSS EXAMINATION.

I heard Mr. Dater's testimony as to the successful operation of these siphons on the New York Barge Canal. I also know from publications that these siphons are used on the barge canal, but they are at that time when the barge canal is in operation. The barge canal is not used when it is frozen over in a solid cake. These siphons are well below the frozen line of ice, and have not broken ice to contend with.

Q. All you have to do is to put the intake of your siphon below the ordinary level of ice, and it won't be bothered in that way, will it?

A. It might be if you had a stream in the East, the ice solid—cake of ice frozen solid, and remains there all winter, except right in the early stages, when it is thin ice, which is in small particles. In this country, coming down the White River—I am speaking from seeing it—we have what we call mush ice, which is loggy,

full of water, and floats very low on the surface. On the racks at White River they have a hard time, owing to the locality and the number of people to be obtained there, to keep that plant open. In fact, the plant has been shut down by ice conditions at that point. On a big plant like the Deschutes, that ice could be allowed to go through the water-wheels of the plant without serious or any danger to them, but for racks sufficiently close together, with iron bars, to keep that ice out, or keep brush and trees out, would keep that ice on the outside.

Q. You think that is an insurmountable difficulty in this case?

A. Oh, no. It means a lot of men with rakes and pikes.

Q. I understand your only contention is about this particular plan of Kelley's; that you admit a siphon arrangement, or the siphon principle, can be used to take care of this flood water at that point? Is that correct?

A. Oh, there is no doubt of that.

Q. And it would take care of the flood water within the limitation of space that they have?

A. I think so. I think it is just a mere matter of design.

REDIRECT EXAMINATION.

Q. If a siphon plan were devised adequate to take care of it, would it be necessary to extend that down to the water below so as to seal the outlets?

(Testimony of J. R. Thompson)

A. They would have to seal the water at a height, the differential height of 32 feet. There would be nothing gained by extending it below if they were sealed. It would mean that additional construction at that point to seal the draft-tube, and the water coming up higher than the end of the draft-tube to seal it. It would mean considerable construction.

Q. It would be necessary to form a pond in which the ends of the siphon would be?

A. Make a water seal to create a vacuum.

Q. What height would the water have to rise before the siphon would become effective, even under those circumstances?

A. It would take perhaps two or three feet above the top of the "U" there to expel the air.

Q. That is five feet high?

A. Yes.

Q. It would require six or seven feet?

A. Yes.

Mr. Wilson: You don't mean six or seven feet over the 60-foot elevation?

A. I think it would. That would be my opinion.

Mr. Wilson: You have never seen one of those in operation?

A. No, not a large one.

Mr. Wilson: You don't know from practice what the water does actually in the circumstances?

A. The only siphons I have ever seen like this are

ether siphons in a chemical laboratory. That has a very small tube, not an eight of an inch in diameter, and it is very hard to get it to operate.

E. S. ROBE, a witness on behalf of defendant, testified as follows:

Q. Where do you reside?

A. 611 East 9th Street, Portland.

Q. What is your position?

A. Auditor Portland Hotel.

Q. How long have you held that position?

A. Slightly over three years.

Q. As such auditor, are you the custodian of the records of the Portland Hotel, and have you them in your possession?

A. Yes, sir.

Q. There was served upon you this morning, Mr. Robe, a subpoena duces tecum, to bring with you the records of the Portland Hotel showing the dates between August 25, 1909, and December 1, 1909, at which Mr. Walter S. Martin was registered at the Portland Hotel. Have you such records?

A. I have.

Q. Will you produce them? (Witness produces book.)

Q. On what date was Mr. Martin registered between those dates?

A. The first record that I find between those

(Testimony of B. F. Laughlin)

dates was, he registered August 9th, August 20th, and October 7th.

Q. August 20th. How long did he remain at the Portland Hotel according to the record?

A. On August 20th, according to the records, he arrived on the 20th, departed on the 26th.

Q. Now, on October 7th, what dates was he there then?

A. October 7th to the 9th.

Q. Have you the register of the Portland Hotel of October 7th?

A. I have.

Mr. Wilson: Will you admit that is his signature, which I think there will be no doubt about.

Mr. Walter S. Martin says that that is his signature on the register of the Portland Hotel on October 7, 1909, and in view of that admission, I won't put the record in evidence.

Excused.

B. F. LAUGHLIN, testified by deposition on behalf of plaintiff as follows:

My name is B. F. Laughlin, age sixty-three, residence Portland at the present time.

I am acquainted with the property situated in sections 27, 34, and 35, township 3 south, range 14 east of the Willamette Meridian, and lot 2 of section 3 and other parts of section 3, and sections 8, 9 and 10, in township 4 south, range 14 east of the Willamette Meridian,

(Testimony of B. F. Laughlin)

commonly known as the Sherar Bridge property, and have known it for forty years. I held an option on it for four years. The option was taken in the name of J. C. Hostettler under my instructions for a water power proposition. There had been no surveys for railroads made over the property at the time I acquired the option. I think the Deschutes Railroad Company made its first survey in the fall of 1908. My reason for thinking so is that the matter of right of way up the Deschutes came up to me early in 1909. I had a conversation with J. P. O'Brien, an officer of the Deschutes Railroad Company, in regard to building a railroad over this property, which conversation I think took place in the latter part of February or first part of March, 1909. I was going to San Francisco with the view of consolidating the lower river and the upper river power, and they wanted to get the right of way on the lower river settled if possible. It was in regard to that that I was taking the matter up with the interested people in San Francisco and seeing if I could adjust matters so that they could run a water grade at the lower river on the land of Moody and the Eastern Oregon Land Company. In that conversation Mr. O'Brien said he wanted me to get all the interested people to agree upon a price for a right of way on the river there, and at the same time guaranteed to protect the Sherar property to the fullest extent that it was possible. He called Mr. Boschke in and asked him about how they had run their grade on the river, and he said they had run it right along—a few feet from water. He told Mr. Boschke

(Testimony of B. F. Laughlin)

he would have to go back and re-run the line and save every foot of power for the Sherar property that could be saved. That they had examined the property with their engineer and that they might have to buy it before they got through but to save every foot it was possible to save. Mr. Boschke remonstrated, said he would have to go back twelve miles. Well, he told him it didn't make any difference how far he had to go back, he must do it.

Q. What, if anything, was said in that conversation about compensation for the right of way?

A. They said they would have to pay the damages and if they had destroyed the property, they would have to buy the property.

Q. Did Mr. O'Brien say in that interview anything about knowing the value of the property for water power purposes?

A. He said they had examined it for that purpose.

Q. What did you say about what should be paid for the property, for right of way over the property for a railroad?

A. I said I should expect pay according to the amount of damages, whatever the height that the road run. There was no amount stated.

I couldn't say at whose instant that interview was brought about, but it was taken up mutually to try to get the matter settled on the right of way below. At the conference in San Francisco the object was to consolidate all those properties together, which fact I told Mr. O'Brien.

(Testimony of B. F. Laughlin)

Along, I think, in the fall of 1909, Mr. Morrow of the Deschutes Railroad Company called me up several times and wanted to get the right of way. I told him that as the matter stood at that time there was a buying privilege out on it and that I could not give him a right of way, and the Sherar's could not give him a right of way, but I thought the Eastern Oregon Land Company would be in shape in a short time so they could deal directly with them upon the title for the right of way. There was no proposition made to me to buy the right of way over the property, nor any sum set or fixed or offered to me for the right of way.

Q. Was the amount to be paid ever discussed except in this interview with Mr. O'Brien?

A. None. It wasn't discussed then.

Q. Mr. Laughlin, what, if anything, did you do so far as giving the Deschutes Railroad Company the right to go and build a railroad over that property?

A. I didn't give them any.

Q. Was any application ever made to you for right to go on that property and build a railroad over it?

A. No; no application more than Mr. Morrow asked me if we could settle the right of way on there and I told him we could not, wasn't in a position to do so.

I do not know personally whether they relocated the line as I was not over the ground afterwards. I know it in other ways but I never talked with Mr. O'Brien about it after the time I speak of when he told me he would have it changed. In talking with Mr. Morrow nothing was said about the location having been changed.

(Testimony of B. F. Laughlin)

Q. What did you know about their constructing the railroad over that property?

A. All I know about it is from hearsay. I don't know anything myself, because I have never been on the ground.

The Hosteller option was afterwards assigned to me by the paper now produced.

Said paper was offered in evidence, being objected to by defendant as irrelevant and immaterial. It was agreed that a copy should be substituted for the original and the same was received in evidence as Plaintiff's Exhibit 1.

I finally transferred my option to the Eastern Oregon Land Company by a writing, I think in December, 1909. There was an agreement made prior to that time in August. The papers now produced, dated August 5th and 6th, 1909, are the papers by which I first agreed to transfer said property to the Eastern Oregon Land Company.

Said papers were offered in evidence and marked Plaintiff's Exhibits 2 and 3, being objected to by defendant on the ground that no proper foundation had been laid for the original option and that said documents tendered were irrelevant and immaterial. It was consented that copies might be substituted.

Mr. Spencer: Was this Exhibit 2 executed by the Eastern Oregon Land Company after or prior to the date that you subscribed to it, do you remember?

(Testimony of B. F. Laughlin)

A. I think it was executed on the next day, on the 6th; I think so. I was not present when it was executed or acknowledged by the Eastern Oregon Land Company.

The paper now shown to me bears my signature.

Said paper was offered in evidence, being objected to by defendant as irrelevant and immaterial and on the ground that no foundation was laid or proof made of the original instruments referred to, and for the further reason that the complaint or amended complaint do not state facts sufficient to constitute a cause of suit. Same was received and marked Plaintiff's Exhibit 4, and leave was given to substitute a copy.

The paper now shown me bears my signature.

The paper referred to was offered in evidence and marked Plaintiff's Exhibit 5, being objected to as irrelevant and immaterial, and on the ground that it was not responsive to any issue in this case, and that the complaint and amended complaint do not state facts sufficient to constitute a cause of action. Leave was given to substitute a copy.

After I had this conversation with Mr. O'Brien in February or March, 1909, I went to San Francisco. I told Mr. O'Brien that we were meeting there to consolidate the lower properties and the Sherar property into one ownership. He asked me if I would try and arrange so that they could get a right of way on the water grade on the lower river. I communicated to Mr. Martin of the Eastern Oregon Land Company the con-

(Testimony of B. F. Laughlin)

versation that I had with Mr. O'Brien when I went to San Francisco, after we thought we had come together. But our agreement was subject to one man's approval that had to be got in Oregon and consequently we could not do anything in that meeting. I did not afterwards communicate with Mr. O'Brien because Mr. Moody, the Oregon party, did not accept the agreement, and I had no conversation with Mr. O'Brien after that time. In the conversation I did have with Mr. O'Brien I told him nothing in regard to developing the power on the Deschutes that I remember except that we expected to develop and for him to protect it as far as he could and pay for whatever he did. He said that they would do that. I think I had only one direct conversation with Mr. Morrow afterwards. I had one or two over the 'phone. In the conversation I had with Mr. Morrow, the one in November I think, I told him to wait until it was settled by the Eastern Oregon Land Company whether they took it. If they didn't take it, then Mr. Grimes and the Sherar heirs and myself would get together and talk with him but up until that was done I was not at liberty. Nothing was said about what we would charge for a right of way nor as to what the railroad company would pay. Nothing was said in that conversation in regard to Mr. Morrow having had any interviews with Mr. Martin about the matter. I don't think he had had any interview with Mr. Martin at that time. No mention was made of any conversation which he said he had had with Mr. Martin.

The conversation had with Mr. Morrow over the

'phone occurred in November, 1909, before the conversation had with him face to face. I refused to negotiate at all at that time, because it was just on the eve of the transfer, which was on December first. I told Mr. Morrow I presumed the Eastern Oregon Land Company would take the plant over. If anything happened that it didn't, why, then it would be a matter for the Sherar heirs and myself to adjust, but in the meantime I did not want to do anything until I got through with them. He made me no offer and he did not ask me to make him any offer. I would not say whether in any of these conversations Mr. Morrow told me that the railroad had relocated its right of way nor about the railroad company being already engaged in building its line. He didn't say anything about that at all. The conversations were at his instance because I suppose he wanted to get the right of way. The Sherar heirs had their interests in the property. Welch and McCornack held some contested rights in the name of the Interior Development Company. Mr. Welch represented to me that he had some interviews with Mr. O'Brien. Mr. Welch and I were at that time negotiating together, expecting to join together in the enterprise. It was agreed between Mr. Welch and me that he should take up negotiations for the property with Mr. O'Brien and he communicated to me the results as they went along. He told me Mr. O'Brien said they would send their engineer there to examine the property, and that they did send him there and examined it.

In these negotiations which I had with Mr. O'Brien

(Testimony of B. F. Laughlin)

and Mr. Morrow, nothing was said as to permission having been given to the railroad company to go up on the ground and build its railroad over it, nor as to what the railroad company had agreed it would pay to the Sherar heirs or to the Eastern Oregon Land Company for right of way over the property.

Q. It is claimed by the Railroad Company in their Answer that they had an agreement by which they were to pay a thousand dollars for a right of way over that property. Did you ever hear of that?

A. I did not. That was never mentioned to me by Mr. O'Brien or Mr. Morrow.

CROSS EXAMINATION.

In April, 1909, at the time of the assignment of the option from J. C. Hostetler to me, Complainant's Exhibit 1, some of the land was in controversy between the Interior Development Company and the Sherar heirs. The Interior Development Company was what was known as the Welch interests and the McCornack interests. When I first was interested in the property was when the Hostetler option was taken. The first writing I had in regard to the land was when the Hostetler assignment was taken. It was the first time I wanted to dispose of the property and to make a contract on it, and that was the object of this assignment, so that I could make the contract direct with the purchaser. Hostetler was buying property from Sherar and he was the man I got to buy it because he could do better than anyone else.

(Testimony of B. F. Laughlin)

I called on Mr. O'Brien prior to the date of the assignment of the Hostetler option to me. I fix the date as February or March, 1909, because I went to San Francisco about that time. I could not give the exact date. I went to San Francisco before I got the assignment of the option. At the time I called on Mr. O'Brien the Deschutes Railroad Company was located practically down on the water grade. I had not been up there. There was a projected power site down near the mouth of the Deschutes River and another one here, that is in controversy in this litigation, and my ambition was to eliminate the one at the mouth of the river and have the interests down there co-operate with me in the installation of a power site at this location up near Sherar's Bridge. My conversation with Mr. O'Brien was to accomplish that purpose to the best extent possible. I did not make any inducement to Mr. O'Brien to raise the elevation of the line at this proposed power site at Sherar Bridge. I suggested they had better go as high as they could because their damages would be larger in proportion to the closer the water they ran.

Q. And he immediately coincided with you right away and said he would elevate the tracks to whatever elevation you wanted, I suppose, did he?

A. No, sir, he didn't. He called Mr. Boschke in and told him to elevate it as much as he could.

Q. Was that to make a survey and see where he could locate and elevate it, or was that—

A. (Interrupting) Positive instruction.

Q. (Continuing)—just to throw the line away

(Testimony of B. F. Laughlin)

from the water grade and throw the line up there on the cliffs?

A. It was positive instruction.

Q. Irrespective of cost, or anything else?

A. Yes, sir.

Q. You want to be understood here as saying in your deposition Mr. O'Brien agreed with you at that time and place that irrespective of cost?

A. I want to say that he instructed Mr. Boschke that he must. There were no conditions in it and it didn't make any difference. Mr. Boschke said he would have to go back twelve miles, and he said it didn't make any difference how much he would have to go back, he must protect that water power to the best of his ability as much as he could.

Q. Yes; and if he did that, you made no inducement to him and there was to be no reciprocal consideration of any kind whatsoever?

A. There was not, sir.

I did not have any further conversation with Mr. O'Brien or conference with him after that day. I knew from hearsay that there was a line run to elevate the road there, and that they had re-run the line.

Q. Isn't it true that you told him that if he could run up there there would not be any substantial charge at all for the right of way?

A. I did not.

Q. Did you claim or pretend to represent the Sherar heirs?

A. I pretended to represent my own interests, my

option on that property. It wasn't up to a matter of pay for right of way at that time, the time that we were talking, at all.

I don't think they were working down on the grade near the water level. They had not been working anywhere at that time that I know of, because they hadn't got the right of way down on the lower river. That was in the spring of 1909.

Q. You are sure they were not doing any work down there in the spring of 1909?

A. I am just this sure of it: That they wanted to get lower down on the river below, and for that reason I don't suppose they were at work on it. I don't think they had agreed upon the right of way at any particular point.

Q. Did you represent to Mr. O'Brien that you could accomplish a deal to eliminate the power site at the mouth of the river and relieve him of the necessity of elevating his track down there?

A. I told him that if we made this settlement that I would do my best to get that thing for a consideration through; that is, I mean a consideration that he would satisfy the Moodys and the Eastern Oregon Land interests, or the combined interests.

Q. Why were you interested in that if you were going to get the line elevated up there at the power site and at the same time get paid for the right of way besides?

A. If we got together we owned jointly above and below. At the time we were there, there was a contested

(Testimony of B. F. Laughlin)

right on a part of this land here and we had been running along and could not develop for the reason there was contested interests. The object of this was to get the Interior Department interested, all of us interested together and do away with that thing and let it go to title. That was the object of it; so that we could improve some place.

That was taken up with Mr. O'Brien for the reason that he wanted the right of way through there, and he asked me to do this for him, as much as I could, which I agreed to do, because it was to my personal interest that we do compromise all of these. The contest referred to was the contest over the Santa Fe scrip between the Sherar heirs and the Interior Development Company. I don't think any height of dam was mentioned by me. I don't have any recollection about that. We had planned upon a sixty foot dam, 60 foot above mean low water.

Q. Didn't you at that time agree that if they would elevate their line to a level that would be sixty feet above low water, or permit the construction of a dam sixty feet high, that they might go ahead with their construction?

A. No, sir, I did not. I said they could go ahead with their construction at that time, provided they paid for it, at any height; if they wanted to pay for all the property they could go on water grade.

I knew that they could go on there without our consent and if we could not agree they could condemn that right of way.

(Testimony of B. F. Laughlin)

Q. You didn't talk much about what they were to pay you at all, did you?

A. No sir, nothing at all as to what they were to pay me.

Q. How did you happen to say they could go there if they would pay you what the stuff was worth?

A. That came up with Mr. O'Brien himself. He told Boschke that they had examined that plant and if they damaged it they would have to pay for it entirely. They would have to buy the property, undeveloped water power privileges, dam site, and the whole thing.

Q. That is what Mr. O'Brien said to Mr. Boschke, is it?

A. Yes, sir, that is what he said to him.

Q. And made no hesitation at all about exposing himself to you as far as money obligations were concerned if he didn't raise his line of railroad?

A. He was talking direct to Boschke at that time.

Q. Well, right openly in your presence and hearing?

A. Yes, sir.

I would not say whether Mr. O'Brien sent for me or whether I asked the privilege of an interview with him or came down to see him, because I don't remember. It might have been either way. The Sherar heirs were in the possession of the Sherar property while this option was outstanding. There were buildings and improvements on some of the property involved in this option. Mr. Grimes' wife is the adopted daughter of Sherar and his wife. She is one of the Sherar heirs and was at that time. I knew at the time the Hostetler option was

(Testimony of B. F. Laughlin)

assigned to me, in April, 1909, about the infirmities in title to some of the land, that is, that the Sherar heirs did not have title to some of it, and at the time this option was taken I didn't know that the dam site, Lot 3, was government land at that time, that the title was not in the Sherar heirs. I supposed it belonged in there. I knew afterwards, when the title was got from the state, and it should have been got before, to that lot three on the dam site. At the time of the assignment of the option, in April, 1909, I knew the condition of the title in there. I don't know whether you would call it vacant government land or not. I knew that the title was at that time in the government. I say lot 3; I don't know about that lot 3. Wherever the dam site was located, that is lot 2 in section 3, in the northwest quarter of the northeast quarter of section 3, township 4 south, range 14 east.

I knew at the time I took the assignment of the Hostetler option that the title to that lot was in the government. I also knew that the same was true with respect to other portions of the land described in that assignment of the option, including the north half of the southwest quarter of section 35, township 3.

Q. Now you executed this complainant's exhibit 2 on the 5th day of August, 1909, wherein you agree upon certain conditions to give title to certain parts of this property that is involved in this option to the Eastern Oregon Land Company for a certain consideration. Up to that time had you been paid any money by the Eastern Oregon Land Company?

(Testimony of B. F. Laughlin)

A. No.

Q. At that time you didn't receive any money, did you?

A. No.

Up to the present time I have received twenty-three thousand dollars. That represents the purchase price to me for the whole property sold to the Eastern Oregon Land Company, except that there is twenty-seven thousand dollars yet to be paid. This also includes the consideration for the toll roads. That is the purchase price of my option. They pay the Sherar heirs aside from that. My option and the consideration received covers certain water rights and all of the capital stock of Tilkenney Road & Bridge Company and of the Tygh and Grass Valley Road Company. Both of these are operated across the river there at the bridge. Simmons was a partner of mine in this enterprise and Hostetler was another party interested with me. The money that was paid to me had to be split by me with Simmons and Hostetler and the estate of J. W. French and E. O. McGoy. I am still interested in the outcome of this matter as to the payment I am yet to receive. The balance of $27,000 is to be paid either in bonds at the rate they are floated or cash. I cannot exact cash unless they are disposed to pay it. The bond provision is not there to inflate the price at all, but is put there in place of $27,000 in cash. The bonds are to be delivered at whatever price they are floated.

I did not go to San Francisco again after February or March, 1909. I had a conference here, however, with

(Testimony of B. F. Laughlin)

Mr. Martin about the time Exhibit 2 was executed. It was in December, 1909. Some money was paid to me on the first day of December, 1909. The conversation I had with Mr. Morrow of the Deschutes Railroad Company was prior to this. Mr. Morrow did not talk price to me at all nor I to him. He called me up at my home and wanted to get it and I told him I could not do it. It was a matter under this contract of a trade which was supposed to go through, I think on the 27th of November, and it didn't close until the first of December, and that I could not do any business with him. I did not say anything to him about his doing business with the Sherar heirs or their representatives. I told the Sherar heirs we could not do any business and they must not attempt to. I talked to Mr. Grimes in regard to this and Huntington. Huntington was the attorney for the Sherar heirs.

Q. Well, they told you as a matter of fact that they had agreed, didn't they?

A. They did not.

Q. How did you happen to be talking with them about it?

A. I knew Mr. Morrow would come up there to see them, and I told them they must not.

Q. Why were you so mandatory to them about it if they didn't say to you that they had made some arrangement with Morrow about grading over this property?

A. I was interested there and this trade was going, and I didn't want to do anything that would interfere

with it, and I didn't want them to talk about it because they had no right to. I told Mr. Grimes, "You have no right to give a right of way; neither have I, under the circumstances."

Q. How was it you were talking to Grimes and Huntington about their giving a right of way to the Railroad Company if they hadn't been doing anything of the kind?

A. Didn't you ever talk to a man before he said he was going to do anything? Did you never talk to him about it? It would be a poor time to talk after they started to do it. It was a good time to talk before they started to do it.

I know that Mr. Morrow went up there to see them and I didn't know until after it was over with that he had talked with them, and I didn't know then anything about it.

Q. If Morrow hadn't tried to buy the right of way from you why did you think he would buy from them?

A. He had called me up and wanted me to do something toward giving him the right of way, and I told him I could not do it.

Q. Didn't you tell him as a matter of fact there wasn't any giving of right of way involved, because Mr. O'Brien was going to pay you for the right of way?

A. I did not. I told him the Eastern Oregon Land Company would probably own it in a few days and they would probably be the people that could give the right of way, and at the present time it was an option and the Sherar heirs could not and I could not.

(Testimony of B. F. Laughlin)

My talk was with Mr. Morrow in November, 1909. It was not several months prior to December 1st. I do not know whether the railroad was completed across there prior to that time or not. It is news to me if it was. The railroad grade was not completed there then. I was not up there. I don't know when it was completed, only as a man knows things that go on over the country without actually seeing it. Mr. Whistler did not represent me and I don't think I ever saw any map in Mr. Whistler's possession of the proposed location of the railroad. Mr. Whistler represented the Eastern Oregon Land Company and I don't know him. Mr. Whistler was not examining the project up there in the spring of 1909 when I was holding the option. I think he examined it some time between August and the first of December or January. I don't know just when. I sold this property in April, 1909, to Isaac Anderson, who is here at present. At that time he was part of the time in Tacoma and part of the time in the East. He was at that time interested with Welch. That was the object at the time the transfer was made. I made a trade with him and he made one payment on it and forfeited it.

With reference to my conference at San Francisco, I think I notified Mr. O'Brien that I could not do anything with it.

Q. You say you talked sixty foot dam to Mr. O'Brien—did you talk sixty feet?

A. I would not say that I did; no, sir; I would not say that. I might have had that in my mind and talked it and I might not.

(Testimony of B. F. Laughlin)

I don't think I talked that to Mr. Martin or to any of the Eastern Oregon Land people. Didn't tell them what the possibilities were there at all. I had several engineers there all the way up the river. The Eastern Oregon people came up to me with a proposition of purchasing. I did not go to them. I gave them what data I had, that is, I gave them the reports of the engineers that had worked on there. That gave an estimate on the different dams and different heights, if I remember. A sixty foot dam was not the maximum. I think there was one on a hundred foot dam. That was by Velie, Cooper & Blackwell. The sixty foot plan was, I think, by Thompson, the engineer. That wasn't done under my instruction. That was done under the Interior Development Company. I guess the Interior Development Company turned that over to the Eastern Oregon Land Company. They succeeded the Interior Development Company as I understand it. I turned it over to the Eastern Oregon Land Company.

Q. In your conference with Mr. O'Brien and Mr. Boschke in the Wells Fargo Building, you stated to them that it would be satisfactory to you and to the people you represented for the railroad company to proceed and build on a right of way that would enable and permit the construction of a sixty foot dam, and that if they would do that and raise the line to that elevation, that you would see that the Deschutes Railroad Company would be given the right of way for a nominal consideration.

A. I did not.

(Testimony of B. F. Laughlin)

I had no talk with them or either of them to that effect. I did not subsequently in conversations had with Mr. Morrow make such representations. The first talk I had with Mr. Morrow I think was in October or November, when he called me over the phone, and the last time was at The Dalles.

Q. Now in your conversation over the phone didn't you have an understanding with Mr. Morrow that they could proceed with construction across this property if that elevation was maintained by the railroad sufficient to go over a dam sixty feet high?

A. I did not, at no time or at no place, nor in the presence of anybody at all.

I think Mr. Morrow was present at the conference I had with Mr. O'Brien and Mr. Boschke in February or March, 1909.

Q. Now at that time and place, didn't you say to Mr. O'Brien and Mr. Boschke and Mr. Morrow that if they would raise the grade as high as they could, that you would be satisfied, and Mr. Boschke, the chief engineer, referred to his profile maps and stated that it was possible for him to reach a height so as to clear a sixty foot dam?

A. It was not.

Q. And you stated that that would be sufficient?

A. I did not. The matter wasn't mentioned, any particular number of feet.

Q. Were there any other persons present at that conference besides Mr. O'Brien, Mr. Boschke, and Mr. Morrow?

(Testimony of B. F. Laughlin)

A. I think there were, but I would not be certain. I don't think Mr. Whistler was present. I never saw him that I know of. I had no representative there at that conference.

I was keen at all times to sell the property but I made no proposition to Mr. O'Brien to sell it.

REDIRECT EXAMINATION.

My associates and I took this option in Mr. Hostetler's name and paid five thousand dollars for it. At the time the option was taken we did not know there was any question about the Sherars owning all of the property mentioned in it. We first heard about it a short time afterwards, perhaps twenty or thirty days. They gave a modification of it in February, after they found the title wasn't good.

RECROSS EXAMINATION.

At the time I went down to California and when I talked with Mr. O'Brien I didn't know where the dam site was except through the report of the engineers who had done the work on the river. They examined the river from the mouth up to Sherar's Bridge. The work cost fifteen thousand dollars to find it out. I guess it ought to amount to something. I guess the dam site was to be located on Section 2 or Lot 2 rather, Section 3, Township 4 South, Range 14 East.

(Testimony of C. Monroe Grimes)

C. MONROE GRIMES, testified by deposition on behalf of plaintiff as follows:

I reside in The Dalles. I am one of the executors of the estate of J. H. Sherar. I know the property described in the option which Mr. Sherar gave, situated on the Deschutes River, near Sherar's Bridge. When I came into possession of the property as executor, there was no railroad surveyed over it to my knowledge. I had been familiar with it for thirty-four years. I never had any talk with any representative of the Deschutes Railroad Company in regard to surveying a line, and locating and building a line over the property. I know Mr. J. W. Morrow and have known him possibly fifteen years. He came to me, representing the Deschutes Railroad Company, for the purpose of getting a right of way over that property from me. This was in The Dalles in 1909, but I could not state the date, along in the spring I should judge. There was nothing said any more than he asked me in regard to getting leave to go upon that property. I told him that we would come to no understanding and we went to Mr. Huntington's office and took it up with him. We set a time and met there. Mr. Huntington was present and I do not think there was anyone else. The talk between us was this: That if the Sherar estate did not negotiate a sale that was on at that time, that they should have the right of way to go through the property for one thousand dollars, but in the event the sale was made they would have to make their terms with the other people. Either Mr. Huntington or myself told Mr. Morrow this. I do not

(Testimony of C. Monroe Grimes)

know as he made any reply any more than it was satisfactory. We told him the Eastern Oregon Land Company was the purchaser with whom we were negotiating.

Q. What did Mr. Morrow say, if anything, about having already negotiated with the Eastern Oregon Land Company?

A. I know nothing about that.

Q. Did you or did Mr. Huntington say anything to Mr. Morrow about giving the Railroad Company the right to go on the ground and build the road if they wanted to without getting consent of the men you were selling to?

A. No, sir, nothing was said about that.

I don't think Mr. Morrow asked for that privilege. I could not state to that. If he did he didn't ask me for the privilege of it, nor of Mr. Huntington in my presence.

The other executor is Mr. S. B. Holmes, who lives in Sherman County, seven miles south of Grass Valley. I am positive he had no negotiations with Mr. Morrow. If he had any, I never heard of it. Mr. Holmes turned over the handling of this property exclusively to me, except just to talk with him on the price of any of it.

I remember no conversation by telephone with Mr. Morrow about this matter. I never saw the letter of August 25, 1909, which you now show me, which Mr. Huntington wrote to Mr. Morrow and I never heard of the telephone conversation referred to. I have no recollection of talking with Mr. Morrow after that one time in the office.

(Testimony of C. Monroe Grimes)

Q. Mr. Morrow states, Mr. Grimes, that in the said negotiations for the purchase of the right of way you stated to him that the principal value of the lands lay in their availability for a power site; that the construction of a line of railroad would enable them to develop this power site, whereas without a railroad it would be practically impossible, and therefore as to the consideration for the right of way, so far as you were concerned you would be glad to donate the right of way in order to secure the construction of a line of railroad, but that in view of the fact that there were many heirs to the estate it would be impossible to satisfy them without a consideration, and that you and he then agreed upon a consideration of one thousand dollars to be paid for the right of way through the Sherar estate property, and that you further agreed that the line of railroad should be built at such a height as to permit of the construction of a sixty foot dam. Now what do you remember about anything occurring from which Mr. Morrow made this statement?

A. I have no recollections of any such talk as that outside of Mr. Huntington's office, which I have just stated there before.

Q. Was anything said between you and Mr. Morrow when you and he were together alone, outside of Mr. Huntington's office?

A. In regard to this matter?

Q. Yes.

A. I have no recollection of anything being said.

(Testimony of C. Monroe Grimes)

Q. No conversation of that kind occurred between you two?

A. No, sir.

Q. Now he says that immediately after you and he had arrived at this understanding you and he went to Mr. Huntington and stated to him the same proposition which I just read to you, and which he says you agreed upon, and that then the same statement was repeated by you, when you and Mr. Huntington and he were together, to-wit, that negotiations were on for the sale of the property; that if consummated the Railroad Company must deal with the prospective purchasers as to the price to be paid for the right of way, but that in the event that the sale was not consummated then every assistance both by yourself and Mr. Huntington would be given to the Railroad Company to secure as early as possible a deed to the right of way upon the terms agreed upon, and that pending either a consummation of the sale or the execution of a deed to the Railroad Company, the Railroad Company should have the right to enter upon and take possession of the lands and construct its line of railroad. Now was anything said between you and Mr. Huntington and Mr. Morrow to that effect in the conversation which you had between yourselves in Mr. Huntington's office?

A. Why, there was a conversation in regard to that, just as you state there, if the property was not sold that they could have the right of way for one thousand dollars and there would be a deed, I think, executed as soon after as possible.

(Testimony of C. Monroe Grimes)

Q. Well, what was said there about the Railroad Company having the right of way to go on the land and take possession of it?

A. None.

Q. And construct its line of railroad?

A. None whatever, that I have any recollection of.

I knew before this conversation that they were building a railroad up the Deschutes. I have no recollection of telling Mr. Morrow anything about that he could build the railroad or could not. There was no talk with Mr. Morrow outside of Mr. Huntington's office that I have any recollection of. We talked it over there with Mr. Huntington in the office, that is all. I never had any talk with any other representatives of the Deschutes Railroad Company. Mr. Huntington had no power without my consent or Mr. Holmes'. He was my adviser in this affair all the way through and was acting as attorney for the executors. I was also attorney in fact for some of the Sherar devisees or heirs. Mr. Huntington was not attorney in fact for any of them but he was the attorney for the executors. I married Mr. Sherar's adopted daughter.

CROSS EXAMINATION.

Mr. Sherar gave the option prior to the time of his death. I do not know to whom he gave the option. I know who held the option at the time the property was sold. Mr. B. F. Laughlin held it. I understood that he bought the option from some parties in the east. I do

not know whom. I could not tell when the railroad first started surveying up the Deschutes.

I first knew that the railroad was going to be constructed up there some time in 1909. I first discovered it by seeing them working there, that is, I surmised there would be a railroad. They were grading there in 1909. They were grading on both sides of the river below the Sherar Estate, at the Sherar property.

Q. Do you know whether they were grading there at the Sherar house right along close to the house and barn on either side in 1909?

A. No, sir, I would not swear to any dates at all. I do not know. I would not swear to the dates when they were grading.

I had not noticed any railroad surveyors up there prior to the time I talked with Mr. Morrow. I never did see any surveyors up there. I have heard men say there were surveyors camped above the property but I never saw them. I could not say when that was. It was told to me in The Dalles. I did not stay on the land personally. I was only up there sometimes once in four or five months. I hired a man to stay there and collect the toll. We were negotiating a sale with the Eastern Oregon Land Company at that time and, of course, there was nothing to do with the land. There was none of it tillable land.

Q. I want to know how you looked after that land up there to know whether any railroads were building or anybody was encroaching on you. How did you keep track of that?

(Testimony of C. Monroe Grimes)

A. Of course, as I state, there was nothing doing up there as I understood until the deal was made with the Eastern Oregon Land Company.

I could not tell when the deal was made with the Eastern Oregon Land Company. I have no dates on when the deal was made. The deal was made through Mr. Huntington, our attorney. That was the deal for the bridge property.

Q. You mean all the property that the Sherar Estate had a deed to, then, when you refer to the bridge property?

A. No, sir, I mean the property in that one lot, the land adjoining the bridge that we were offering to sell, was all that we called the Bridge property, and everything pertaining to it.

I suppose it is in the southeast quarter of section thirty-four, township three south, fourteen east. I cannot recall the first talk I had with the representative of the Deschutes Railroad Company with reference to the Sherar land.

Q. Was it that first talk that you and Mr. Morrow had in the cigar store up there?

A. That is the only one. That is in regard to the railroad matter. It is the only time I recall talking with any of the parties about it.

Prior to the construction of the railroad we reached the Sherar property either by team or auto. It is supposed to be thirty miles from The Dalles to Sherar's Bridge. The nearest town on the other side was Grass Valley in Sherman County, eighteen miles away. The

grades on those roads are always kept up in good shape. They are not overly steep, I would say. They weren't so steep but what four horses could haul forty hundred up. I couldn't give you any percent of the grade. I don't know, because I am no surveyor. When I talked with Mr. Morrow he told me he wanted to get a right of way over the Sherar lands. I told him I wanted to go and talk it over with my attorney, which I did. Then we two went up there and talked to Mr. Huntington. Either Mr. Morrow or I told Mr. Huntington what he wanted to get. Mr. Morrow did not say anything about going upon the land and surveying a right of way. The whole conversation was that he should have a right of way for one thousand dollars through that land provided the sale was not negotiated. There was nothing said as to what he was to do in the meantime while he was waiting for this sale. He didn't mention that to me at all. That was as far as I recollect the whole conversation and understanding. There was nothing else said outside of that we would furnish him a deed as soon as we could if the sale were not made. I don't think we had any considerable conversation pro and con about the general features of it. I don't think there was anything more said. I would not swear there was nothing else said in regard to this right of way through that property.

Q. Are you prepared to swear now that Mr. Morrow said nothing to you about surveying there in the meantime?

A. He might have said it. I am not prepared to

(Testimony of C. Monroe Grimes)

say that he asked to go on the ground to survey or that he did not.

Mr. Huntington had full power to act for me in that matter in his talk with Morrow. He was my counsel and he and Mr. Morrow might have had conversations in regard to that that I know nothing about. I recall distinctly that the understanding was, if the sale didn't go through, the company could have a right of way for one thousand dollars over such lands as the Sherar estate owned. I could not say when it was the next time I was on the Sherar land after my talk with Morrow. I was there within a year afterwards. At that time the roads were practically half way through, I should say, through the Sherar lands the next time I was there. I could not swear that the first survey of the Deschutes Railroad was along the waters' edge. I saw some stakes driven there. I supposed they were railroad stakes. I know that the grade was afterwards raised considerably higher. I was told it was put up there for a dam site, so as to protect the dam site.

Q. You didn't have any negotiations at all in regard to a dam site there with the Railroad Company?

A. Not any more than they were notified, that is in our talk with Mr. Morrow, that if we gave them a right of way through there they would have to keep high enough to protect the dam site.

Q. How high a dam site would they have to protect there?

A. I had nothing to do about the figures that the dam site was to be, the height they were to keep. It was

supposed to be from sixty to sixty-five feet, my understanding was.

Q. Wasn't it fifty-five feet you were talking about?

A. No sir, I don't think so. I never heard of any fifty-five feet.

Q. What did Mr. Morrow say about keeping up there to protect the dam site?

A. I have no recollection of his making any reply whatever.

Q. Who were you representing when you were talking about elevating the road there to go over the dam site?

A. I understand there was a filing on the dam site there, and of course, the dam site had to be protected.

I do not know whose filing was on it. I had no filing there and the Sherar Estate had none to my knowledge. I have no recollection about any other talk for right of way with the Deschutes Railroad Company outside of this one with Mr. Morrow. I had talked with Mr. Clark with reference to the right of way on the other side of the river. I do not know that there was anything said about a dam site on the other side. The Oregon Trunk people crossed the Sherar land. They would have to cross it on that side. They did not deal with me in securing the right of way. They had the same right of way that we gave the other people. We gave them just the same privilege that we did the other people. It was the same exactly with the two roads. I told the Oregon Trunk people that they could build and have the right of way for one thousand dollars, provided the option did not

(Testimony of C. Monroe Grimes)

go through. I won't swear that there was anything said to the Oregon Trunk people about elevating the road because the sale was negotiated before they got on to the land.

Q. That is, this option you speak about was taken up before the roads were built?

A. No, sir; the option wasn't taken up until the property was sold.

I had quite a lot of business to look after there in connection with the estate and I cannot at this late date remember everything that occurred, dates and times, etc.

Q. And you might have forgotten a good deal that transpired in connection with that?

A. No. You go back four years—

Q. (Interrupting) And you might have forgotten a good deal that had taken place there in one way or another?

A. In regard to the property?

Q. Yes, between yourself and these different people talking to you.

A. Why, there could such a thing happen; certainly.

REDIRECT EXAMINATION.

When I speak about the bridge property, I include all that the Sherar estate owned there on the river, including the land that was in litigation.

(Testimony of Isaac W. Anderson)

RECROSS EXAMINATION.

Q. What land do you refer to when you talk about the land that was in litigation? Is that the property there at the dam site?

A. I don't know exactly where the lines ran, but I always understood that it took in the falls.

I do not know where the dam site is there. I know where they have been working, a short ways above the falls. I cannot state exactly the people that were having the litigation. Mr. Sherar was one of them. He was on the opposite side from Mr. Veazie. All I know is in a general way.

Q. Mr. Sherar and Mr. Veazie scripped that property, didn't they, the dam site there, with Santa Fe scrip?

A. Mr. Sherar scripped it. That is my understanding he scripped it. Of course, I never saw it. That is, all I know is in a general way about that land.

ISAAC W. ANDERSON testified by deposition on behalf of plaintiff as follows:

I reside in Tacoma, Washington. In 1909 I had the lands of the Sherar estate, in controversy here, under consideration for their purchase. We were expecting to buy them under the option which was then in Mr. Welch's hands, as I recall it. My figuring was with Mr. Welch. In connection with these negotiations we took up with Mr. O'Brien of the Railroad Company the matter of the location of the road. I can't say the date now. I saw him several times. It was in the summer of

(Testimony of Isaac W. Anderson)

1909. I went to see Mr. O'Brien in company with Mr. Welch. I cannot give the exact language of the conversation, of course. I can give you the general conversation. We were expecting to construct a water power plant there and our talk with Mr. O'Brien was regarding the location of the road; it should be high enough to allow us to build, to put in those improvements, the required improvements which included naturally a dam, and our plans were to build a dam sixty feet high.

Q. Did you so inform Mr. O'Brien or not?

A. And it was understood exactly; yes. We had the maps there and went over the maps with him, or with the engineer, and the understanding we had was that the line would be so located that that dam of that height could be built; and my recollection is Mr. O'Brien instructed, then and there, Mr. Boschke to so locate the line.

Mr. Boschke was the chief engineer and the interview occurred in Mr. O'Brien's office. Then, I think, we went to Mr. Boschke's office, which was a story or two below, but it occurred practically in Mr. O'Brien's office. There was no dispute or contention between us at all. It was entirely a friendly arrangement.

Q. You say Mr. O'Brien gave some instructions; repeat his language as nearly as you can that he used to Mr. Boschke at the time.

A. I told you I cannot repeat the exact language, but only the general intent, as a matter of fact. As I say, he instructed Mr. Boschke that our filings and the rights of the Interior Development Company, as he un-

derstood it, were legal and that the company was acting in good faith, intended to act in good faith, and that when they would locate it they would locate it—we stated what our needs were, and that the line should be located accordingly. We didn't ask for anything unreasonable, and he didn't object.

Q. Was anything said by Mr. Boschke or any of the others present as to the cost that would be involved in such construction? If so, what was it?

A. I don't think there was any definite amount mentioned, but Mr. Boschke stated, said in reply to Mr. O'Brien, "Well, that will add largely to the line, to the construction of the line," or to that effect.

Q. What did Mr. O'Brien reply to that, if anything?

A. He affirmed what he said before, that the line should be built there, that we had the rights there, and they should be protected.

CROSS EXAMINATION.

I am president of the Washington-Oregon Corporation, and operating electric lights and railways and water plants. I am operating in the vicinity of Vancouver and Centralia. We have a water plant at Vancouver and a railroad. My office is here in the Yeon Building. Mr. Welch was with us. He is not now with us. He was our general manager for several years.

Q. In regard to this option, you spoke about the purchasing of the Sherar land. Whom were you dealing with at that time?

(Testimony of Isaac W. Anderson)

A. As I said, my dealings were entirely with Mr. Welch.

Q. Do you know whom he was dealing with on this option?

A. I know in a general way, what he told me, with the Sherars.

I think Mr. Grimes was the name. I am not certain. There were two. I went to The Dalles once myself and met one of the executors. This option covered the purchase of the Sherar lands and water rights; that is, the lands so far as they controlled the water,—the lands at the falls and above the falls; covered all the lands that were required in the construction of the plant. I don't know whether I can locate them on the map or not. It was the land owned by Sherar at the falls, below the falls and above the falls, which were necessary to develop the water power. Now that is about as concise a statement as I can give you. I do not know the legal subdivisions. In a general way, it was the Sherar property that was necessary for the development of water power. I do not know what that included in acreage. I cannot recall it.

I contemplated joining with Welch and McCornack in the development of the property. I cannot give you the dates when I first knew that these roads were being constructed up there by this dam site or when it was first brought to my attention. It was when it was generally stated and published that the railroads were going to be built and the road was to be built. I may have known it before the general statement. I guess probably I did but I am not sure. I can't tell how long I knew it before

the conversation I have referred to with Mr. O'Brien. I guess I knew before I talked with Mr. O'Brien that a road had been surveyed along the river bank. I have no idea as to the length of time it was. I suppose that I went to Mr. O'Brien, being interested in the Sherars development, that as soon as I learned or we learned that the railroad was to be built, I at once took it up with Mr. O'Brien.

Q. You knew that road was surveyed practically along the water level before you took it up with O'Brien?

A. Of course I did—no, I didn't know any survey; I knew they were contemplating.

Q. Building along———

A (interrupting). That they were surveying, yes; and that is what we objected to, and that was the purpose of our going to see Mr. O'Brien, to get the road elevated so we could build a sixty foot dam.

Q. Did you submit any plans of your dam at that time, as you recall, to O'Brien, or any of those parties?

A. I think we did. Now there were blue prints there and maps. Whether they were the railroad company's or our own, I can't tell you, and I could not identify the map. I know we had a plat there.

Q. Who was with you at that time? There were you and O'Brien and Boschke and who else?

A. Mr. Welch and I went to see—as I tell you, my recollection is I had several talks with Mr. O'Brien. I used to see him quite frequently, and this particular time when this understanding was, when this agreement was made or the understanding reached, Mr. Welch and I

(Testimony of Isaac W. Anderson)

went to see Mr. O'Brien in his office, and after talking with him he either called Mr. Boschke up or we went down to his office, I am not sure which. I don't recall that Mr. Spencer was present.

The gist of our conversation was that we wanted the railroad built, of course, but we wanted it so located that we could build, that it would not interefere with us building the dam which we contemplated, sixty feet in height. I don't pose as an expert engineer or hydraulic man. I have had a good deal of experience; mainly though, in the line of digging up the money.

Q. When you were talking about a sixty foot dam, how high did you figure the road would have to be elevated to permit of the construction of a sixty foot dam?

A. I don't recall now any definite height or definite line for the road, excepting, as I say, in a general way, for a sixty foot dam, which would allow for the necessary structure, and that the railroad themselves could determine how high their line must be to take care of the flood waters above that.

Q. Do you recall in that conversation that O'Brien said they would go as high as they could and that Boschke said it was possible to reach a height there so that a dam sixty feet high could be constructed, and that you and Mr. Welch told him that that would be satisfactory so far as you were concerned?

A. That is all we ever asked them to do. To locate the line so that we could build our dam sixty feet high.

The engineer Whistler was not connected with us up there in any way as I recall. During this conversation

we had some maps and profiles of the Deschutes Railroad Company, examining them. Mr. Boschke told Mr. O'Brien it would be quite costly to elevate this track.

Q. And Mr. O'Brien told him to go ahead and do it anyway?

A. That is my recollection.

Q. That you people were entitled to have your sixty foot dam there, so far as Mr. O'Brien was concerned?

A. That is my recollection.

I did not take any of those maps or profiles away as I recall. Welch may have taken some of them but I didn't. Mr. McCornack, as I understand it, was jointly interested in the deal with Mr. Welch. I wasn't interested in it in the beginning.

Q. Do I understand, Mr. Anderson, that you had acquired flowage rights for the construction of a sixty foot dam for the property above the dam?

A. That is my understanding, excepting there was one small piece of government land, I think, which was filed on with scrip and had not been acquired; that is my recollection; but it was afterwards; I understand since it has been acquired.

Q. That was to permit the construction of a sixty foot dam?

A. That is my understanding—was at the time.

Q. But you never attempted to acquire any flowage rights for any dam higher than that?

A. Higher than a sixty foot dam? I am not sure; I don't think so.

(Testimony of Isaac W. Anderson)

Q. As I understand your testimony, you and your people never at any time contemplated building a dam any more than sixty feet high?

A. That is my recollection. We talked considerably about the thing, pro and con, but that was our final decision.

Q. At that time, what was said with reference to the right of way across the property which you had the option on?

A. I don't recall that that was mentioned, except in a general way Mr. O'Brien knew that we were very anxious to have the railroad built in there, because of the convenience of transportation.

It would lessen the cost of construction of the power plant. It would save a twenty or thirty mile haul.

Q. Now, at the time you were talking there, wasn't it understood you told O'Brien you wanted the road elevated, didn't you say at that time, you and Welch, your people, that if he would elevate it to that height that that would be satisfactory to you and that the railroad company could have the right of way free of charge if they would elevate it above to clear your sixty foot dam?

A. I don't recall that. That may have been mentioned, and it may not. I would not deny or affirm that.

I think I was there during the whole conversation. I don't recall any such conversation as that between Welch and O'Brien. I don't recall anything of the kind. I would not deny or affirm that. I don't recall it. I don't recall any conversation about right of way at that

time. It is very natural there might have been, but I don't recall it. I never at any time offered to sell right of way to the railroad company for any particular price. I did not personally. Welch might have, I don't know. I can't recall that we did.

Q. What argument did you bring to bear on O'Brien to get him to elevate the railroad?

A. Because we had the rights there, had filed on them. That was the argument. We would rather have it done peaceably than through litigation. We considered we had a right for a higher dam, if we wanted to build it.

The whole thing was a friendly proposition and I don't think we ever had any arguments, hot words, or anything else. I don't recall anything being said about the company going on the land. As I say, I think the natural inference is that that matter was discussed, but I can't recall it. I don't think the property at the dam site was in litigation at the time I was talking about purchasing the property. The litigation came up afterwards I think. Of course, I knew there was a contest when it came up. Whether it came up before or afterwards, I don't know. I think it was afterwards. I only know about the filing of water appropriations from what I learned from Mr. Welch. He attended to all the practical details. My recollection is that Mr. Welch filed plans and specifications with regard to the proposed improvements there showing what he intended to do or wanted to do. I was not a member of the Interior Development Company. I never took any elevations of these

(Testimony of Isaac W. Anderson)

roads as they were graded or constructed. I have been connected with building and operating railroads all my life. I could not give any idea as to the cost of changing that grade where it was first surveyed to its present elevation. I don't know the quantities or anything about it.

In the discussion as to the cost by Mr. Boschke and Mr. O'Brien, in my presence, as I recall it Mr. Boschke said: "That will cost a barrel of money." I know that it would necessarily increase the elevation to get over a sixty foot dam site.

My interest in the property ceased at a certain time shortly after that. I never followed it up. I simply quit, that is how it ceased.

Q. What was your reason for quitting? Wasn't the property satisfactory?

A. No; on account of the contest over the title, and there were plenty of other places where I could invest all the money I could dig up.

The contest I refer to was the contest over the Sherar holdings, which carried with them the water right. That is the reason I dropped the proposition. You could not get a dollar to invest in it as long as it was in litigation or in dispute.

RE-DIRECT EXAMINATION.

When I say a sixty-foot dam, I mean sixty feet above the stream level, water level.

RE-CROSS EXAMINATION.

I figure the height of the dam from the low water level, the mean water level. The plant would raise the

water sixty feet above the natural level of the stream, in other words, give it a sixty foot height, fall. Give us a fall of sixty feet, or a head of sixty feet. We figured on a dam of that height, a dam of sixty feet.

JOHN T. WHISTLER, testified by deposition on behalf of plaintiff as follows:

I am a civil engineer, employed at present in the U. S. Reclamation Service. I have been in the employment of the U. S. government approximately ten years altogether, nearly seven of which have been in the reclamation service, and the other three years on hydraulic engineering of some character. I am not a graduate but have had some twenty years experience.

I am acquainted with the lands in controversy in this suit and have examined them as to their availability for power purposes. The examination was made at the request of Balfour, Guthrie & Company for the Eastern Oregon Land Company in the summer of 1909, I think. The only surveys made at that time were in the nature of a personal examination, with hand level elevations and paced distances. Subsequently a topographic survey was made under our direction. After making that survey I made estimates of the possibilities of the site for power purposes and of the developments which were possible there, and as a summary of those estimates I made a report to the Eastern Oregon Land Company setting forth the ways in which I considered the site was available, which is embodied in the paper now handed

(Testimony of John T. Whistler)

me, and truly sets forth the results of my estimates which I then completed as a result of the survey made under my direction. This survey and estimates cover the present dam site, to-wit: the one adopted by the Interior Development Company, according to my recollection, some four or five hundred feet above the head of the falls. The elevation of sixty feet was assumed as the basis of that estimate. This report was made about October, 1909. I have the substance of the estimate in my notes. The original would be in the files of Balfour, Guthrie & Company, I think. I have notes in brief covering the data given there for my own future reference, but they are not strictly the notes from which that estimate was prepared. Those would be in our office files, computations, and so on, carried in separate files from the reports proper. I have checked the report by my estimates and by the data which I have in the book—the report that is now produced in court—and find it correct according to the book.

The paper was offered in evidence. Same was objected to by defendant as irrelevant and immaterial and further objection was reserved until after the original should be submitted. The papers was received and marked Whistler's Exhibit 1, and accompanies this record.

Q. Mr. Whistler, state what the comparative advantages would be to the power project if a higher dam than a sixty foot dam could be constructed at that site?

A. It is my opinion that the cost per horse power

developed would be somewhat cheaper for a higher dam, for the reason that the cost of construction of a dam from sixty to one hundred and fifty feet ordinarily does not increase in the same proportion that the cost of equipment for the higher heads decreases.

Defendant moved to strike out the answer of the witness as immaterial on the ground that it is not claimed in the supplementary and amended complaint that there is any right to construct a dam higher than sixty feet, and as immaterial and irrelevant. The same objection is understood to go to all evidence respecting the construction of any dam above sixty feet.

The witness: With a ninety foot head as against a sixty foot head, there would be one and a half times the pressure, and in addition, there would be an increase in the velocity of water through the wheel in proportion to the square root of the increased head. Those two expressions would indicate the increased power which could be obtained from the same wheel, not considering increased shaft and bearings, supports, settings, and so on, for the heavier work. The increase in power would be considerable more than proportion of increase in cost as between the two up to certain limits—uncertain limits, rather.

The original tracing of the map or blue print now shown me, marked "Proposed railroad locations and existing highways in vicinity of Sherar Bridge, November, 1909," was prepared in our office. The blue print without pencil marks indicates the location of the toll roads as they then existed. The red lines indicate the location

(Testimony of John T. Whistler)

of the toll roads which I recommended or suggested to the company. The yellow lines indicate, as I recall it, the location proposed by the railroad company, and in a general way they were constructed by the railroad company in conformity to the yellow lines, except the road to Shaniko on the east side of the river, which they actually constructed as called for. The road to Grass Valley was not constructed in accordance with my recommendations. Instead of making one crossing over the railroad for the two roads, north and south, they have one crossing for the Shaniko road and another crossing for the Grass Valley road, and further have located it inside of the rimrock or nearer the river bed, in a position which might interefere with some of the alternative schemes of the development proposed. The Grass Valley road is the road running down the Deschutes River, and is located between the railroad and the river instead of being located above the railroad. I don't think I asked it of the railroad company. I don't know that I even presented this to Mr. Boschke in any way. I simply got from Mr. Boschke what he had, or what he proposed, and this is my recommendation to the Eastern Oregon Land Company, or Balfour, Guthrie & Company. I did not approve of the location as laid out by Mr. Boschke. If, as has been considered by some of the proposals, the power plant were located in this region, it would mean the relocation of the Grass Valley road altogether above the railroad; it would mean the expenditure of that much money.

There would not be room between the railroad and

the river for both the power plant and the road. It would interefere with what we have referred to in our estimate as the Kelley scheme of carrying the water in a broad canal down on this bench above the river and below the present location of the railroad.

On this map the line with cross marks indicates the Deschutes railroad and is marked "Deschutes Railroad" on the east side of the river. The buildings that are designated as barn and hotel are the Sherar property buildings, and the point at which the word "bridge" is written is what is known as Sherar Bridge.

The defendant offered the said map as an exhibit to accompany the testimony of the witness.

In answer to questions by Mr. Wilson, with reference to the materiality of the map, the witness testified:

A part of the road is opposite the proposed dam site and the other part of it stands between four and five thousand feet below the dam site. The road runs above the railroad track on the opposite side from the river approximately three thousand feet. That is the present road as constructed, and at all points the road runs above the railroad track from the proposed dam site to a point some hundred feet below the bridge, approximately twenty-five hundred feet.

Q. Where did your project contemplate the power house to be?

A. There were four alternatives which we submitted.

Q. Did you make recommendation as to any par-

(Testimony of John T. Whistler)

ticular one of these projects as being more feasible or practicable than the others?

A. It is my impression I did. I may have made the recommendation in effect in this way: By numbering the alternatives in the order of what I considered their value. The power house in alternative number one would be just below the falls. The present location of the toll road would not interfere with the canals for that purpose. Alternative number two proposes diversion—I think this map does not extend that far; what has been known as the island diversion or island scheme, or Kelley's scheme, was the plan originally proposed by Mr. Kelley, diverting by a low dam; my recollection is that it was fifteen or twenty feet, barely enough to regulate the inflow of water into the canal, and carry the canal along on this bench on the east side of the river to some point, as I have stated in my estimate, approximately five thousand seven hundred and fifty feet down stream on the east bank. The net head in this case is sixty feet. That was all set forth in the estimate.

Q. To what extent would this toll road interefere with that project over and above the former location of the toll road?

A. It would interfere to the extent of practically all the relocation of the Grass Valley road by the railroad company; perhaps not quite all, but practically all of it.

Q. What difference is there in the elevation of the old road and the present road?

(Testimony of John T. Whistler)

A. I can't tell you that. I can't give you that from memory. It can be taken from the map.

The old road, I think, was very close to the grade of the railroad; I think within ten feet for some distance. I cannot tell what the present elevation of the road is, except from the map—from the contour. I have no data that we haven't here, to-wit: The map and Whistler's Exhibit 1. The report does not show the elevation of the toll road, but the map does. I can't tell even the elevation of the present road. I can't tell that even from this map because I am not certain that this map showing the location of the toll road as proposed by the company was actually followed. That could only be told or determined by a map subsequent to the construction of the road.

Q. Where would this canal have to be constructed in order to get the sixty foot elevation along the hill that you have referred to?

A. It would be whatever the diversion dam is at the head above the river at that point, and approximately sixty feet above it at the tail.

Q. Is the present toll road sixty feet above the river?

A. No, I think not.

Q. And therefore you could not utilize that part of the hill for your canal, could you? I mean without filling it in or builiding it up to the height that your canal would require.

A. Yes. It could be done by a retaining wall on the river side between the canal and the river.

(Testimony of John T. Whistler)

Q. For how great a distance?

A. The entire distance. The estimate states 5,750 feet approximately.

Q. And at a height of approximately sixty feet?

A. Varying from the height of the diversion, fifteen or twenty feet, to, as I remember it, something like thirty or forty feet at the lower end; not sixty feet, because at the lower end the bench referred to is at some distance above the water surface.

Q. Now, Mr. Whistler, as a matter of fact, that toll road as at present located, would not make any difference on that canal over and above what the railroad line as now located does, would it?

A. Yes, I think it would make some difference.

Q. With the railroad there at the present time the toll road does not make any difference, does it?

A. Yes, I think it does.

Q. In what respect?

A. It would have to be removed, to be relocated, in order to maintain the property. In order to maintain the toll road it would have to be moved to the upper side of the railroad.

The elevation of the railroad varies from about 770 to about 750. Alternative number three proposed a sixty foot dam at the site of the Interior Development Company's canal on the west bank to power house just above the falls. That would be on the opposite side from the Deschutes Railroad Company and therefore this toll road would not interefere any way with that. The fourth alternative proposes a sixty foot dam with open canal on

west bank for two thousand feet, and tunnel for twenty-eight hundred feet, and the change in the toll road would not in any way interfere with that project.

The map was received in evidence and marked Whistler's Exhibit 2, over the objection that the same was immaterial and irrelevant. Same accompanies this record.

RE-DIRECT EXAMINATION RESUMED.

I made a more detailed estimate of what is called alternative number one in Whistler's Exhibit 1. This is the copy thereof which I sent to Balfour, Guthrie & Company. The original went to Mr. Walter S. Martin, president of the Eastern Oregon Land Company. This truly sets forth our preliminary estimate as to that project, or as to this alternative.

Plaintiff offered the paper in evidence as an exhibit.

Questions by Mr. Wilson: This contemplates a canal on the west side of the river?

A. Yes. That is, on the side opposite to that on which the line of the Deschutes is built.

Q. Has there ever been any definite plan adopted for dam and power development of that property?

A. Not that I know of.

Q. You mean by the company?

A. Not that I know of.

The offered exhibit was objected to on the ground that the same was irrevelant and immaterial. There-

(Testimony of John T. Whistler)

upon the paper was received in evidence and marked Whistler's Exhibit 3, and accompanies this record.

DIRECT EXAMINATION RESUMED.

Q. Mr. Whistler, there has been some claim made in the case that Mr. Boschke, the chief engineer of the defendant company, during the year 1909 furnished you a profile showing the location of the defendant's road over the lands in controversy and that you approved that location. State whether or not any such profile was ever furnished to you by Mr. Boschke?

A. I think probably it was. I remember some profiles were furnished.

Q. In connection with the furnishing of profiles was any statement made to you by Mr. Boschke as to the height or elevation of the road above the water surface of the river at the proposed dam site above the falls. If so, state what his statement was.

A. I find from the correspondence that at one of the interviews with Mr. Boschke, at the instructions of the company I obtained a profile from Mr. Boschke which did not show the elevation of the water surface, and that I asked him if this could be obtained, or if this were available, and he said it was his impression that the railroad at the dam site proposed was about seventy feet above the water.

This was during a conversation with Mr. Boschke. I cannot give you the date. I think the correspondence, however, will show it. By referring to a letter now shown me, written to Balfour, Guthrie & Company, I

(Testimony of John T. Whistler)

should say the date was very probably October 5, 1909.

Q. What is the fact, Mr. Whistler, as to your ever having undertaken to approve, or in any way approved the location of the railroad over the plaintiff's lands there?

A. I did not.

Q. In this case there is considerable evidence as to statements made about the height of the proposed dam, and reference is made to a height of sixty feet above the water surface. What is meant in an engineering sense by the statement of the height of a dam at sixty feet as applied to the location there?

A. In this case I think there would be practically no question but that it refers to sixty feet from whatever water level is considered, to the crest of the spillway, that is, crest of the masonry work of the dam.

My recollection is that we had in mind the maximum length of spillway as four hundred feet, and that the total extreme length of the structure would be between five and six hundred feet on top. It depends somewhat on the character of the design and the exact location.

CROSS-EXAMINATION.

Q. Why do you say that you do not think there would be any question as to the meaning of the height of dam in this case, as referring to the crest of the masonry work and the spillway?

A. Because that is a common expression, or the common, customary part of the dam to refer to for a

(Testimony of John T. Whistler)

dam which has the spillway practically across the entire channel.

Q. Is it the universal custom, or is there some question in the minds of engineers?

A. I think there might be a question.

Q. Considerable question?

A. No, not a considerable question; a very little question.

Q. Engineers differ, however, in that respect?

A. Yes; I think you will be able to find some engineers who would refer to the height as to some other point than the spillway crest.

I have not with me the map or profile that was furnished me by Mr. Boschke on the 5th of October, 1909. I was at that time employed by the Eastern Oregon Land Company and was representing them as advising engineer in connection with the Sherar Bridge property. I would not say it was with particular reference to the dam at the proposed site of the Interior Development Company, but with reference to any matters that came up at that time, building of toll road, questions of toll road, and title. The conference took place in Mr. Boschke's office, I think, at the direction of the company, either through Balfour, Guthrie & Company, or possibly at the request of the president of the company, Mr. Martin. I am entirely unable to say. I went to Mr. Boschke's office at that time.

Q. Was that your principal business on that visit, to investigate the height of the dam?

A. No, no; my recollection is that it was for the

purpose principally, if not entirely, of obtaining these profiles. I think Mr. Martin had had some personal conversation, either a short time previous or by correspondence. At any rate, I was told that if I would go to Mr. Boschke's office, he would give me certain maps and profiles. That was the purpose of the visit.

I am unable to say with whom Mr. Martin had had a conference. I am not certain that he had a conference with them. It might have been through correspondence.

Q. Anyway, you got information from the company that you could secure profiles showing the height of the line at that point if you would call upon Mr. Boschke?

A. I did.

Q. And you went for that purpose?

A. Yes.

Q. And to investigate the height at which the line was being constructed

A. I think it included that.

Q. You were on the properties at that time, were you?

A. Yes; I had been.

Q. Was there any construction going on at that time?

A. I am unable to say, because I was up there so many times, both before and after, that for this particular time I don't believe I could say whether any construction had been commenced or not.

I don't remember whether they were working all along there at that time or not. I can't tell where the

(Testimony of John T. Whistler)

profiles or maps are that were furnished by Mr. Boschke at that time. They may be in Whistler & Stubblefield's office, now Mr. Stubblefield's office. They may have been transmitted to the company's office, or they may be with Balfour, Guthrie & Company's office, their agents. I am unable to tell you. I reported to the people that I represented that I had secured such maps.

Q. Did you make any investigation on the ground to see whether the line was being constructed on those profiles?

A. As I remember it, we did subsequently. I think I advised the company at that time that we were unable to get—to obtain the elevation of the railroad location with regard to the water, and that it would be essential to have somebody go on the ground and make survey to determine it satisfactorily.

Q. Didn't you have a further conference with Mr. Boschke in the latter part of October, in which he furnished you definite data as to the height of the railroad?

A. It may be. I don't know.

Q. And about the 20th of October?

A. It is quite possible.

I think I can probably secure those profiles and maps that were furnished me. We generally have some difficulty in locating any maps that relate to Eastern Oregon Land Company matters, because of the three offices. I rather think I can.

Mr. Wilson: I would like to call upon the witness, as well as upon the complainant, to furnish those maps, produce them.

(Testimony of John T. Whistler)

The witness, continuing: I do not know whether I could recognize to your satisfaction the tracing they were taken from, if I should see it. The profiles of the different locations made along there would all look very much alike, and it would be very difficult to do unless there were some distinguishing mark as to date or something I could recognize other than the profile and the elevations.

Mr. Wilson: I would like to serve notice we would like to have those produced at the trial.

Mr. Veazie: We are perfectly willing to produce it. We would have had it here this afternoon if we could have found it.

Questions by Mr. Wilson resumed.

Q. You never made any protest to Mr. Boschke, or any official of the Deschutes Railroad Company that the road was not being constructed in accordance with the profiles or at a sufficient height?

A. I think not. I have no recollection of ever doing anything of the kind.

Q. And whatever information or maps you received you communicated to your principals?

A. I think so. That is my practice.

Q. And within a short time after receiving it?

A. Yes; that was our custom, and I have no doubt I did it in this case.

I am again in the government employ. I have been employed lately in the Deschutes River territory, on the

(Testimony of John T. Whistler)

design and construction of two dams, the Bend Power and Light Company's diversion works, the Central Oregon Irrigation Company's north canal and dam. The first project I referred to is located at the town of Bend on the Deschutes River. The second project is the property of the Central Oregon Irrigation Company, formerly the Deschutes Irrigation and Power Company. The diversion is about a mile north of Bend on the river. That is not a storage reservoir. It will take the flow of the river at all times of the year that it is desired. It is an irrigation canal and is not a power canal. That project does not contemplate, as far as our connection with the design or project is concerned, that the water during the flood season shall be stored for use during irrigation season. There has been a future development which they have considered in connection with it for storage, but it would have no relation to this design.

I have also been connected with another project up there for the government or state which contemplates storage of the flood water. That would be at the head of Benham Falls, or somewhere within a mile above. The storage would be in what we have called the Benham Falls reservoir site above the dam. That is about 135 miles above Sherar Bridge. That is just in the process of investigation, and it may be all the way from nothing to over two hundred thousand acres as an irrigation project, with alternative power possibilities, none of which are worked up. The maximum development there of this project would store all the flood water during the flood season.

(Testimony of John T. Whistler)

I have also been connected with another storage reservoir project on Crooked River, slightly. I cannot recall the size of this project. The work or the development of that feature was worked out by another man and my connection with it is little more than having read his reports at the present time. That is located on the Crooked River, about the town or postoffice of Post, some twenty miles above Prineville. It is contemplated that that will take care of practically all the flood waters at that point if it is constructed. The limit or maximum development there would take all of the flood waters of Crooked River. In preparing this report we took the records of the United States Geological Survey for the minimum and maximum flow of the river. We made no measurements of our own. We took their records. Their records are prepared, the data is obtained by what are called guaging stations, a station at which a guage is established, the daily heights recorded, and occasional measurements by current meters made to determine the rating curve, as it is called. I simply took their figures of approximately 4,000 second feet. I did not estimate from our figures. I simply took their figures. We hade made our estimates on the assumption that 4,000 second feet would be availabale at this site, a minimum of 4,000. I have made no investigation as to the maximum flow at that point, but have used the records of the United States Geological Survey. They show on the maximum discharge a little over 30,000 second feet at the mouth of the river, and we have assumed that it is approximately the same at Sherar Bridge. The topo-

(Testimony of John T. Whistler)

graphical surveys referred to as having been made under my direction, were made by Mr. Perry. I could not tell without reference to the map what we found to be the fall of the river for a distance of a mile above the proposed dam site, and I have not the map with me. I cannot tell from memory without reference to the map how far up the river a dam sixty feet would back the water. My impression would be it is about six miles.

Q. What is contained in the detailed report that you refer to that is not contained in your preliminary report.

A. Alternative number one referred to here includes estimate for equipment, while all the alternatives in this estimate here refer only to cost for developing the water power but not the construction of power house and installation of equipment. This was made for comparative purposes only.

Q. Had you, in either one of these reports, decided on any definite location.

A. No. I think we at no time decided on a definite location. I don't think we felt at any time that we were authorized to do this. We were requested to furnish the company with certain information, for their information, presumably, to know whether they wanted to go ahead and finanace the project and also to know which shemes, which alternatives would be the best to work on in the obtaininig of the right of way or title to property. That is my assumption.

I think I made estimates of the cost of the dam located at the point known as the Interior Development

Company's dam site. This estimate apparently does not state just where the dam was to be located. It is my impression, however, that it was on the Interior Development Company's dam site. Before construction is undertaken it is material to know what the underlying formation is under the dam, or before much money is involved. It is very valuable to know that even when you are making up your report. It is practicable to construct a dam on a gravel formation or on a loose lava formation. We did not take any borings at any of these dam sites to know what the underlying formation was.

Q. It might be practical to construct a dam there, but the cost might be prohibitive, mightn't it?

A. It might be; yes.

I think perhaps I have constructed only two dams in loose rock or lava formation. They were very low dams, A few feet high, simple diversion dams.

Q. You did not construct any sixty foot dams on a lava formation, did you?

A. No.

Q. You would not contemplate doing any such thing, as an engineer, would you?

A. Yes, there might easily be circumstances under which I would. I would rather not. I would rather have good bed rock.

Q. As an engineer you would not recommend it, generally speaking?

A. No, I won't say that. It depends altogether on the circumstances, how valuable the raising of the water

(Testimony of John T. Whistler)

to the height desired would be, and how much money my client can put up.

Q. Now, in these reports that you made here, you never at any time contemplated a dam more than sixty feet high, did you?

A. We made no report on anything over sixty feet.

Q. Why didn't you make a report on a dam over sixty feet?

A. I think our instructions were to prepare estimates on that basis.

Q. That was all they were interested in at that time?

A. I am not clear about that, but that is my recollection of it. We were instructed to prepare our estimates on the basis of a sixty foot dam.

Q. Now when was your last report here made with reference to the report of J. G. White & Company?

A. J. G. White & Company's reports were made subsequent to ours. That is my recollection.

Q. How long, do you know?

A. I think about the following year.

White's man was not there until after we made our report. We had completed both our preliminary work and report before White's man came out there.

I can't tell exactly the first date on which I conferred with Mr. Boschke or any of the railroad people about this proposition. I should say it was some time within a few weeks of the first of August, 1909. That is little more than a guess. The next conference was approximately in October. I could not tell in a way that would

be worth anything as evidence without taking my correspondence and digging it out of the correspondence. The different persons connected with the Deschutes Railroad Company that I talked to about the matter were Mr. Boschke, Mr. Brun, the chief draftsman, and Mr. Morrow.

I am unable to say when I was first employed by the Eastern Oregon Land Company or Balfour, Guthrie & Company with reference to the Sherar property. I was asked the latter part of 1908 to make a trip up the river, but with special reference to the Moody site, and I am not certain that any reference was made to the Sherar property at that time. I did, however, go up the river and come out at the Sherar property. I had been employed prior to June 25th or 26th, 1909, with reference to the Sherar property. That employment lasted in one way or another, as we would be called on for further information, until I took up this government work. I took up the government work about the first of April, 1913. I can't say exactly how many times I was up there from June, 1909, to January, 1910, possibly half a dozen times. That is largely a guess. I was up there more in the summer time than in the winter. I can't say that I was up there in October, 1909. I was up there some time after construction commenced. I was up there one time, I remember, before the rails were laid. The grading had been done. The bridges, I believe, were not in, as near as I can fix it. I don't think I was up there at any time when the grade was being

(Testimony of John T. Whistler)

actually constructed above Sherar Bridge. I don't believe I was.

Q. At the time you went to Mr. Boschke's office, about October 5th, 1909, you had been informed that construction was going on there?

A. I think so, yes.

RE-DIRECT EXAMINATION.

Q. What appears to be the formation, from such examination as you made at the proposed dam site, as to whether it is a loose, volcanic rock or solid rock?

A. There is no loose volcanic rock on top. I have no knowledge of what is in the bottom of the channel.

Q. At such points as the river has cut, at the falls and below, to a considerable depth, what sort of formation is disclosed?

A. Nothing but solid rock at any place I know of in the Sherar Bridge region.

Approximately 75 per cent of the flow of the Deschutes River is below the proposed storage projects on the upper river and there are no storage projects or irrigation projects connected with that 75 per cent flow of any appreciable amount. The Deschutes River is probably much more regular and constant than average rivers, average streams, and certainly much more so than streams in the arid states. It carries remarkably little drift wood and a remarkably small amount of sediment. I believe it is regarded as one of the most uniform streams, as far as flowage is concerned, in this part of the country.

(Testimony of Thomas F. Richardson)

THOMAS F. RICHARDSON, testified by deposition, on behalf of plaintiff, as follows:

I am 58 years of age; reside in Brooklyn, New York. I am a civil engineer. I have made surveys, studies and estimates for numerous hydro-electric developments, including Winnipeg, Manitoba, 150,000 horse power; Big Creek, California, 100,000 horse power; Saskatoon, Saskatchewan, 6,000 horse power; Baker River, Washtington; Bonny Eagle, Maine; Lake Caspereau, N. S.; Idaho, Oregon.

I am acquainted with the firm of J. G. White & Company and have been employed by it since September, 1907. From September to December, 1907, I was construction superintendent in charge of the construction of the La Crosse hydro-electric development. From January 1, 1908, to September 1, 1909, I was general superintendent in charge of all construction work for J. G. White & Company. From September 1, 1909, to date I have been chief civil engineer and have been engaged in making reports and estimates on all kinds of construction work, including hydro-electric construction.

I visited the Deschutes River near Sherar's Bridge on November 5th and 6th, 1908, in the interests of Mr. A. Welch, Portland, Oregon, and Mr. Isaac Anderson, Spokane, Washington, who proposed to build a power plant at this site. In May, 1910, I saw the paper purported to be a report on the Deschutes River power project, made by White & Company, now handed me and marked Complainant's Exhibit 1, and I previously fur-

(Testimony of Thomas F. Richardson)

nished a large part of the data contained in it. The surveys were made by Mr. E. A. W. Hammatt of Hyde Park, Mass., who left New York for Portland, Oregon, about January 3, 1910, and was engaged on the surveys about one and one-half months. Mr. Hammatt then went to San Francisco, where preliminary studies and estimates for this project were made in the San Francisco office of J. G. White & Company. These were brought to New York by Mr. Hammatt, where they were revised and more careful studies and estimates of cost made. The surveys were made under my direction and the studies and estimates contained in this report were also made by me or under my direction.

At the proposed dam site the Deschutes River runs through a deep basaltic valley, the bottom of this valley between the precipitous side slopes being 300 or 400 feet wide, the side slopes rising 60 or 70 feet in 100 on both sides to a height of 500 feet or more above the river. At times of flood flow in the river the whole bottom of the valley is covered with water, but usually the river is confined in a narrow gorge in the middle of the valley. This gorge is from 40 to 100 feet wide and the water in the gorge is from 20 to over 50 feet deep. The statistics on which paragraph three in the report of J. G. White & Company, entitled "Water Supply" are based, were obtained from the Portland office of the U. S. Geological Survey, Mr. C. J. Stevens, District Engineers, and were worked up and arranged under my direction. The amount of power set forth in paragraph four of said report of White & Company is estimated as fol-

(Testimony of Thomas F. Richardson)

lows: Knowing the amount of water available as determined in paragraph three, namely, that under present conditions there would be 5,200 second feet, and if all the water above Bend were diverted and none of it returned, there would be 3,500 second feet, and also knowing the height of the proposed diversion demand of the tail water below the power house, thus being able to determine the head, the amount of power can be determined by formula.

$$\text{H. P.} = \frac{\text{Cubic feet per second} \times \text{head} \times 62.3 \text{ pounds}}{550}$$

With reference to paragraph five of the report, my judgment is that this project would be best developed by building a diversion dam at site number one, 175 feet above the head of the falls, constructing a tunnel of sufficient size 3,200 feet long for conveying water from above this dam to a power house located about 1,875 feet below Sherar's Bridge.

The foregoing testimony was offered and received over the objection of defendant, to the witness testifying from the report on the Deschutes River project made by White & Company on the ground and for the reason that said report was made long after defendant's railroad was constructed and in operation, and is therefore incompetent, immaterial, and irrelevant for any purpose whatsoever in this litigation, and also on the ground and for the reason that if the aforesaid report is admissible for any purpose it is the best evidence of what is therein contained, and there is no necessity or occasion for this

(Testimony of Thomas F. Richardson)

witness to undertake to interpret same since it is plainly stated in said report what is meant thereby.

The following are detailed estimates of the cost of work for developing this project on the basis of stream flows of 5,200 second feet, 3,500 second feet, and 1,750 second feet with crest of dam at elevation 765:

Estimate of Cost.

Development on basis of 5,200 C. F. S. stream flow. Installation 45,100 E. H. P. Load factor 80 per cent.

Preliminary work	$ 14,000
Plant, tools, camp, etc	195,000
Taking care of water	100,000
Dam and abutments	349,420
Headwork of tunnels	86,000
Tunnels	815,540
Penstocks	45,000
Power house substructure	103,000
Power house superstructure	77,000
Hydraulic equipment	252,720
Electrical equipment	472,500
Permanent quarters	15,000
Local administration	78,000
Contingencies, 10 per cent	260,320
	$2,863,500
Contractor's profit, etc., 10 per cent	286,400
	$3,149,900

(Testimony of Thomas F. Richardson)

Estimate of Cost.

Development on Basis of 3,500 C. F. S. Stream Flow.

Load Factor	80%	60%
Installation	30,400 E. H. P.	40,500 E. H. P.
Preliminary	$ 14,000	$ 14,000
Plant, tools, camp, etc	155,000	185,000
Taking care of water	100,000	100,000
Dam and abutments	349,420	349,420
Headwork of tunnels	80,000	86,000
Tunnels	615,860	745,780
Penstocks	30,000	40,000
Power house substructure	69,000	95,000
Power house superstructure	52,000	70,000
Hydraulic equipment	168,500	228,000
Electrical equipment	315,000	425,000
Permanent quarters	15,000	15,000
Local administration	60,000	70,000
	$2,023,780	$2,423,200
Contingencies	202,380	242,320
	$2,226,160	$2,665,520
Contractor's profits, etc., 10%	222,640	266,580
	$2,448,800	$2,932,100

(Testimony of Thomas F. Richardson)

Estimate of Cost.

Half Development on Basis of 1,750, C. F. S. Stream Flow.

Load Factor	80%	60%
Installation	15,200 E. H. P.	20,250 E. H. P.
Preliminary	$ 14,000	14,000
Plant, tools and camp, etc.	95,000	115,000
Taking care of water	100,000	100,000
Dam and abutments	349,420	349,420
Headwork of tunnel	50,000	50,000
Tunnel	307,930	372,890
Penstocks	15,000	20,000
Power house substructure	69,000	95,000
Power house superstructure	30,000	40,000
Hydraulic equipment	85,000	117,000
Electrical equipment	160,000	215,000
Permanent quarters	15,000	15,000
Local administration	50,000	55,000
	$1,340,350	$1,558,310
Contingencies 10%	134,040	155,830
	$1,474,390	1,714,140
Contractor's profit, etc., 10%	147,410	171,460
	$1,621,800	$1,885,600

(Testimony of Thomas F. Richardson)

Summary of Power Available and of Costs
Elevation of Crest of Dam 765

Average		Total E.H.P.		Cost E.H.P.			K. W. H. Output
Flow	L.F.	Base	Peak	Total Cost	Base	Peak	Annual
5,200	80%	36,100	45,000	$3,149,900	$ 87.30	$ 69.80	236,000,000
3,500	80%	24,300	30,400	2,448,800	100.80	80.60	159,000,000
3,500	60%	24,300	40,500	2,932,100	120.70	72.60	159,000,000
1,750	80%	12,150	15,200	1,621,800	133.50	106.70	79,500,000
1,750	60%	12,150	20,250	1,885,600	155.20	93.30	79,500,000

The above estimates do not include the cost of real estate, water rights, transmission or distribution, nor do they include expenses incidental to organization, financing or interest during construction. They do cover all construction costs, including a contractor's profit and a reasonable allowance for contingencies.

DIRECT INTERROGATORY 12: Give an estimate of the cost of operating this project, when developed.

Defendant objected to interrogatory No. 12 on the ground and for the reason that the same is incompetent, immaterial, and irrelevant in that it makes no difference in this litigation what this witness may think it would cost to operate this conjectural power plant when developed.

A. Assuming the first construction to be the development of 20,250 E. H. P., at 60 per cent load factor, giving as average output of 12,150 E. H. P. at the power house, the interest charge at 6 per cent on $155.20, the cost per base E. H. P. would be $9.31. Adding to

(Testimony of Thomas F. Richardson)

this $4.00 for operating expenses and taxes we have an annual production charge of $13.31 per E. H. P. to which must be added charges incident to marketing.

DIRECT INTERROGATORY 13. State what engineering and construction features the development of this project presents and what difficulties are presented.

Defendant objected to Interrogatory No. 13 on the ground and for the reason that it is immaterial what engineering features or difficulties are concerned in the development of this conjectural power plant.

A. The engineering and construction features of this development present no unusual difficulties. It will be necessary to construct coffer dams of considerable size and cost so arranged as to control and pass the water of the river during the construction of the masonry dam, and to excavate tunnels of considerable size as well as to build a power house and install hydraulic and electrical machinery, but none of this work presents unusual difficulties.

DIRECT INTERROGATORY 14. Assuming that the railroad of the Oregon Trunk Railroad Company is at an elevation of eight (8) feet higher than the railroad of the Deschutes River Railroad Company where said railroads cross the site of this proposed river power project, state to what extent the amount of power which may be developed at this site is curtailed by the location of the Deschutes Railroad Company's line in

excess of the curtailment of the amount of power which may be developed at this site by location of the Oregon Trunk Railroad Company's line.

Defendant objected to Interrogatory No. 14 on the ground and for the reason that there is no evidence in this case supporting the hypothetical questions and on the further ground that the same is incompetent, irrelevant and immaterial in that the height of the Oregon Trunk Railroad is not involved in this litigation.

A. Assuming that the railroad of the Deschutes River Railroad Company where it crosses the dam site is eight feet lower than the railroad of the Oregon Trunk Line Railroad Company, the height of the crest of the dam would be limited to elevation 765, while its height of crest as limited by the railroad of the Oregon Trunk Railroad Company would be 773, thus reducing the available head eight feet; the amount of power possible to develop at these elevations of crest of dam and the curtailment due to the lower elevation of the Deschutes River Railroad are as follows:

Electrical Horse Power

	Elevation 5,200 second feet.		3,500 second feet.		
Crest of Dam	Base	Peak 80% L.F.	Base	Peak 80% L.F.	Peak 60% L.F.
765	36,100	45,100	24,300	30,400	40,500
773	39,600	49,500	26,600	33,300	44,400
Curtailment	3,500	4,400	2,300	2,900	3,900

(Testimony of Thomas F. Richardson)

DIRECT INTERROGATORY 15. From the examination which you made on the ground, state how in your opinion this project should be developed most economically if no railroads were constructed along the Deschutes River, giving the amount of power which could and in your judgment should be developed, the cost of the development which in your judgment would be most economical, a description of the development which you would adopt, estimates of its cost, the cost per horse power, and the annual production charge per horse power.

Defendant objected to Interrogatory No. 15 on the ground and for the reason that it calls for a conclusion of the witness which is not based upon any facts in this case but is merely asking the witness to guess what would happen under the facts therein stated.

A. From my examination on the ground and from subsequent studies and estimates, I believe that the most economical development for this project, if no railroads were constructed along the Deschutes River, would be to construct a diversion dam at Site No. 1, having a crest elevation of 820 or 55 feet higher than it is now possible to construct it because of the Deschutes River Railroad and 47 feet higher than it is now possible to construct it because of the Oregon Trunk Railroad.

The tunnels and headworks for controlling and conveying the water from above the dam to the power house would be located similarly to what they are for the lower head developments made necessary by the railroads as

constructed and the costs of these features would be the same as for the lower head developments. The power house and equipment and penstocks would also be located similarly as for the lower head proposition, but would cost somewhat more on account of the larger amount of power development and the greater pressures. The head available with the crest of dam at 820 will be 137 feet, while the head available with the crest of dam at 765 as limited by the Deschutes River Railroad is 82 feet.

The following tabulations show the total electrical horse power available for dams, with various heights of crest, the estimated costs of the developments and the costs per horse power, with flows of 5,200 second feet and 3,500 second feet.

Estimate of Cost

Average Flow, 5,200 second feet, 80% L. F.

Elev. Top Dam	Head		Total E.H.P.		Estimated	Cost per E.H.P.	
	Gross	Net	Base	Peak	Cost	Base	Peak
765	86	82	36,100	45,100	$3,149,900	$87.30	$69.80
773	94	90	39,600	49,500	3,310,800	83.70	66.90
780	101	97	42,700	53,300	3,475,200	81.50	65.20
800	121	117	51,400	64,300	4,005,500	77.90	62.30
820	141	137	60,200	75,300	4,625,800	76.80	61.40

Estimate of Cost

Average Flow, 3,500 second feet, 60% L. F.

Elev. Top Dam	Head		Total E.H.P.		Estimated	Cost per E.H.P.	
	Gross	Net	Base	Peak	Cost	Base	Peak
765	86	82	24,300	40,400	$2,932,100	$120.70	$72.60
773	94	90	26,600	44,400	3,087,500	116.00	69.60
780	101	97	28,700	47,800	3,234,700	112.70	67.70
800	121	117	34,600	57,700	3,738,700	108.10	64.80
820	141	137	40,500	67,500	4,350,100	107.40	64.40

(Testimony of Thomas F. Richardson)

DIRECT INTERROGATORY 16. If the railway line of the Deschutes Railway Company was not constructed upon the Deschutes River, but the railway line of the Oregon Trunk Railroad Company, were constructed at the elevation at which the same is shown by the report of J. G. White & Company to be located, give a description of the development of this project which under those circumstances you deem most economical, the amount of power which should be developed by the plan which you deem the most advantageous and economical, giving estimates of the cost of the development, the cost per horse power and the annual production cost per horse power of the development of power which under those circumstances in your judgment would be most economical and advantageous.

Defendant objected to Interrogatory No. 16 on the ground and for the reason that it is not shown that the witness is qualified and his answers to said interrogatories must of necessity be mere conjecture and speculation.

A. The Deschutes River Railroad limits the height of the crest of the dam to elevation 765. If this railroad had not been built the height of the crest of the dam would have been limited to elevation 773 by the Oregon Trunk Railroad, the track of which is eight feet higher where it crosses the dam site, than that of the Deschutes River Railroad. The plan of development would be the same for a dam with a crest elevation of 773 as for one with a crest elevation 765, but there would be eight

feet more head available, thus giving additional power.

On page 5 (page of this abstract) is a tabulation entitled "Summary of Power Available and of Costs" for a development with the crest of the dam at elevation 765 for various average flows and load factors. Following is a tabulation giving the same information for a dam with its crest at 773.

Summary of Power Available and of Costs
Elevation of Crest of Dam 773.

Average Flow	L.F.	Total E.H.P. Base	Total E.H.P. Peak	Total Cost	Cost E.H.P. Base	Cost E.H.P. Peak	K.W.H. Output Annual
5,200	80%	39,600	49,500	$3,310,800	$ 83.70	$66.90	259,000,000
3,500	80%	26,600	33,300	2,610,600	98.10	78.40	174,000,000
3,500	60%	26,600	44,400	3,087,500	116.10	69.50	174,000,000
1,750	80%	13,300	16,650	1,750,400	131.60	105.10	87,000,000
1,750	60%	13,300	22,200	2,011,700	151.30	90.60	87,000,000

The above estimates do not include the cost of real estate, water rights, transmissioin or distribution, nor do they include expenses incidental to organization, financing or interest during construction. They do cover all construction costs including contractor's profit and a reasonable allowance for contingencies.

Assuming the first construction to be the development of 22,000 E.H.P. at 60% load factor, giving an average output of 13,300 E.H.P. at the power house, the interest charge at 6% on $151.20, the cost per base E.H.P. would be $9.07. Adding to this $4 for operating expenses and taxes we have an annual production charge of $13.07 per E.H.P. to which must be added charges incident to marketing.

(Testimony of Thomas F. Richardson)

In answer to CROSS INTERROGATORIES, the witness testified as follows:

I have had no experience in making surveys and estimates for hydro-electric plants on the Deschutes River, other than for a plant at Sherar's Bridge.

Cross Int. 2. Did you make surveys, studies and estimates for hydro-electric development at the point known as Sherar's Bridge or did you rely on the surveys and estimates made by other parties?

A. I relied on surveys made under my direction by Mr. E. A. W. Hammatt, civil engineer of many years' experience, of Hyde Park, Mass.

On my visit to the Deschutes River I examined the site carefully, noted the character of the material and the construction difficulties which might be encountered and looked up distances to the nearest railroad points, inquired into labor rates, etc. I made no surveys nor did I prepare any maps or drawings of the proposed development.

As I remember, the report of J. G. White & Company was made for Mr. Walter Martin of San Francisco, but until I look up my records I am not sure that we were employed by him. We understood that Mr. Martin proposed to build a power development at this point and the data we used in making this report were obtained from surveys made under our direction by Mr. E. A. W. Hammatt. We also collected data regarding stream flows from the records of the U. S. Geological Survey. The surveys were made in January and Feb-

ruary, 1910. The estimates were made in New York in the latter half of March, 1910, and the report was written in the San Francisco office about the middle of May, 1910, from data furnished by the New York office. No estimate was made of the cost of acquiring the dam site or of the cost of the flowage rights above the dam site. Our surveys only extended up the river one-half mile above site No. 1, and do not furnish sufficient data to state how far up stream the back water curve will extend from the crest of the dam projected in our report. The fall in the water surface of the river in the first half mile above site 1 is about 3½ feet.

Cross Int. 9. Referring to paragraph II of the report heretofore handed you, in which it is stated that a masonry dam can be constructed above these falls to increase the effective head to 86 feet without interfering with railroads now building on either bank, you may state how high a dam could be constructed at this point so as not to interfere with the railroads you report as building on either bank, and state what elevation the railroads referred to were being constructed along the river past this dam site at the time you made this report?

A. The Deschutes River Railroad, where it crosses the proposed dam site, is at an elevation of 776.1, and the Oregon Trunk Railway is 8 feet higher. The crest of the proposed dam is at elevation 765, or 11.1 feet lower than the Deschutes River R. R., this being considered a proper margin so that the river, when in flood, will not encroach on the Deschutes River Railroad.

There is probably very little ice flowing down the

(Testimony of Thomas F. Richardson)

river during the winter and at flood times, but I have no knowledge as to the amount of other drift material. The length of the crest of the dam will be about 500 feet. Our records of flow in the river cover the four years 1906 to 1909 inclusive, during which there was recorded flow of 30,600 C. F. S., which would give a depth of water of 6½ feet over a crest 500 feet long. The depth of 11.1 feet was adopted as a safe margin for much larger flows than are shown in our four years of records, and it is not believed that any higher dam could be safely built with the Deschutes River R. R. as at present constructed. The development of power at this site is expensive largely because of the low head which it is possible to utilize owing to the construction of the two railroads.

In making my estimates for paragraph four of the report, I did not consider the market for power and made no estimate for distributing same. The elevations of the railroads were furnished to our engineer, Mr. Hammatt, by the engineers of the two railroads. Our records show a difference of elevation between the two railroads at site 1 of 8 feet; at 300 feet above site 1 of 6.1 feet, and 600 feet above site 1 of 4.34 feet. It is not practicable at high water to maintain a crest elevation of 60 feet above low water, or elevation about 775, as the Deschutes River Railroad is about 776. Our surveys do not extend far enough up stream above site 1 to state how far up stream the back water curve would be extended by a dam constructed to an elevation of

765 and how much further up stream it would extend if a dam were constructed at an elevation of 775.

It was the intention to haul materials from Grass Valley, at which there is a railroad, and the haul would be about 20 miles over a road which is said to be all down hill. The construction of the railroads along Deschutes River would reduce the cost of transporting material, but not very materially, as most of the heavy materials for construction would be obtained at the site of the work.

If the Oregon Trunk Railroad were four feet higher than the Deschutes Railroad, the curtailment in power would be half of what it would be if the difference in elevation were 8 feet.

Cross Int. 16. If it should appear in this case that the parties, who are attempting to develop the power site mentioned in your report, never had acquired title to the dam site nor acquired any flowage rights or rights to flood the lands above the power site, what if any effect, in your judgment, would this have on the economical development of a power site at this point?

A. It would have no effect in my judgment on the economical development of a power site at this point, whether flowage rights or rights to flood had been acquired or not. Flowage rights are rarely acquired at the time a report is made on a power development and frequently are not acquired until after the construction is completed.

No borings were taken at the dam site, but a number of soundings were made to determine the depth of

(Testimony of Thomas F. Richardson)

water. We should not undertake to build a dam until borings were taken, but the formation of the country indicated that a suitable foundation could be obtained and that no beds of gravel or other porous formation existed at the proposed dam site.

Cross Int. 18. In the report heretofore handed you, you state in several places that the development of this power site would be more expensive than the development of other power sites in this vicinity; under these conditions why would it not be more practicable, from an economical standpoint, to select one of the other power sites referred to where the development would not be so expensive, and is it not a fact that these less expensive power sites, referred to, will in the natural course of events be developed before the more expensive sites and by reason thereof furnish all the electrical power market or power needs of the territory and market tributary to these power sites for many years to come?

A. The statements referred to concerning high head developments are for comparison only and refer to such developments already made whose market is in Portland, Oregon, and as the market for Deschutes power has not been investigated or determined, cannot be applied to this case specifically. I know of no suitable site for a high head development in the vicinity of the Deschutes River. If the Deschutes River Railroad and the Oregon Trunk Railroad had not been built, a higher head could be used for this proposition which would reduce the cost per horse power of the development materially.

(Testimony of Edward A. W. Hammatt)

EDWARD A. W. HAMMATT, testified by deposition for plaintiff as follows:

I am 59 years old, reside at Newton Center, Mass., and I am a civil engineer. During the last six or eight years I have made surveys, studies, and estimates for hydro-electrical development for Charles T. Main, for J. G. White & Company, and also for certain prospective owners of hydro-electric development. These developments were on the Connecticut River near Brattleboro, Vermont, on the Saco River, at Bonny Eagle, Maine, the Deschutes River, Oregon, the Williams River near Bellows Falls, Vermont, on the Deerfield River running from Melbrun Falls, Massachusetts, to Somerset, Vermont, and on the Aros River in Mexico. I have been employed by J. G. White & Company as civil and hydraulic engineer in making surveys, plans and estimates for hydro-electric development. I visited the Deschutes River near Sherar Bridge, Oregon, in January and February, 1910, for the purpose of making surveys and getting data necessary to make estimates for the development of power. I never saw the original report on the project made by White & Company but saw a copy of it this morning. The surveys of the site of the Deschutes River power project and the plans upon which everything was based were made by me. The detailed studies were made by Mr. Thomas F. Richardson and the estimates were made under Mr. Richardson's direction. I assisted. All surveys, studies, and estimates were made under the direction of Mr. Richardson.

(Testimony of Edward A. W. Hammatt)

The canyon of the Deschutes River in the neighborhood of Sherar's Bridge varies in width at the bottom from approximately 100 to 500 feet. The sides are mainly of volcanic rock and in places rise almost perpendicular for 100 to 200 feet and then slope back to a height of 800 to 1000 feet above the bed of the stream. The stream channel itself at low water stages will vary from 40 to 200 feet in width, approximately, and in depth from 15 to 50 feet.

For the statistics contained in paragraph three of the report of White & Company, entitled "Water Supply," I made copies of the official records in the office of the U. S. Geological Survey in Portland, Oregon. I had nothing to do with making up the estimates as to the amount of power, but I presume that it was arrived at from data secured by me.

The foregoing testimony was offered and received over the objection of defendant, to the witness testifying from the report on the Deschutes River project made by White & Company on the ground and for the reason that said report was made long after defendant's railroad was constructed and in operation, and is therefore incompetent, immaterial, and irrelevant for any purpose whatsoever in this litigation, and also on the ground and for the reason that if the aforesaid report is admissible for any purpose it is the best evidence of what is therein contained, and there is no necessity or occasion for this witness to undertake to interpret same since it is plainly stated in said report what is meant thereby.

(Testimony of Edward A. W. Hammatt)

All the surveys and plans made by me were carefully and accurately made and data regarding stream flow were obtained from U. S. Geological Survey by me and the elevation and finished grade of the railroads I obtained from railroad engineers who were constructing the railroads. My elevations were based on bench marks given me by the railroad engineers, and by me reduced to a common base.

CROSS EXAMINATION.

I have had no other experience along the Deschutes River other than that gained in these surveys, I tramped over the territory extending from one-half to three-quarters of a mile above the Falls, to about a mile below the Falls, made a careful examination of the property and made a topographical survey and plan showing the stream, position of buildings, and railroad locations, took soundings at several sections across the stream, and in general secured data for a study of a possible development of power at this site. I made some maps, etc., but cannot attach any of the papers to this deposition as I delivered them to J. G. White & Company at the completion of my work.

I arrived in Portland about January 9, 1910, and made my surveys at the site during January and February, returning to Portland about the 16th or 18th of February. I then went to San Francisco, and in conjunction with Mr. Ashbaugh made some preliminary estimates which were wanted immediately by J. G. White & Company at that place, leaving San Francisco about

(Testimony of Lewis E. Ashbaugh)

March 2nd or 3rd for New York where in conjunction with Mr. Richardson additional studies were made and revised estimates were prepared during March, 1910.

LEWIS E. ASHBAUGH testified by deposition on behalf of plaintiff as follows:

My age is 41 years. I reside at 14 Elston Road, Upper Montclair, New Jersey. I am a civil engineer. Following ten years general work in railroad and structural engineering, I was for three years Office Engineer of the Central Colorado Power Company in charge of investigations, surveys, designs, estimates and all engineering work preceding construction of two large hydro-electric plants; then four years in my present position as an hydraulic engineer with J. G. White & Company, making investigations, designs, and estimates in the preparation of reports on various hydro-electric projects and developments in this country, Cuba, and Brazil; together with special study of several German and Swiss hydro-electric plants and industries manufacturing waterwheels, pipe lines, etc. For nearly seven years I have been associated with the firm of J. G. White & Company, their chief hydraulic engineer being our consulting engineer for The Central Colorado Power Company, and during the past four years I have been employed by this firm on report work as noted in the preceding answer.

I have never visited the Deschutes River. I assisted in February, March, and April, 1910, in the preparation

(Testimony of Edward A. W. Hammatt)

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I have never visited the Deschutes River. I assisted in February, March, and April, 1910, in the preparation

of the report on the Deschutes River power project made by J. G. White & Company, now handed me. The surveys were made by Mr. E. A. W. Hammatt. The preliminary designs and estimates were made by me in our San Francisco office, Mr. Hammatt assisting. The designs and estimates were then revised and approved by Mr. T. F. Richardson, chief civil engineer of J. G. White & Company, in New York office, whose memoranda and estimates were used in compiling the final report in the San Francisco office. Since the date of the report I have learned that the surveys were made under the direction of Mr. Richardson.

I have not visited the site and my information regarding it has been obtained from conference with Mr. Hammatt and others, and studies of maps, reports, etc. The electric horse power available at the power station switchboard is found by the formula E. H. P.—.085 Q H where Q is the quantity of water in cubic feet per second and H is the effective working head in feet. The power at the site in question should be developed by the construction of a dam just above the head of the falls which would serve to develop head and divert the water into tunnels which would conduct the water approximately 3200 feet to a power station at the foot of the rapids. With the railroads located as they are the head is limited to approximately 86 feet, but our estimates show that a higher dam would be more economic, even to developing the limit of 141 feet of head, but which would form a reservoir to cover the railroads.

(Testimony of Lewis E. Ashbaugh)

The foregoing testimony was offered and received over the objection of defendant, to the witness testifying from the report on the Deschutes River project made by White & Company on the ground and for the reason that said report was made long after defendant's railroad was constructed and in operation, and is therefore incompetent, immaterial, and irrelevant for any purpose whatsoever in this litigation, and also on the ground and for the reason that if the aforesaid report is admissible for any purpose it is the best evidence of what is therein contained, and there is no necessity or occasion for this witness to undertake to interpret same since it is plainly stated in said report what is meant thereby.

My estimates of the costs of the various proposed developments would be as already given in the report under section VI, and the operation is as estimated in the report under Section VII. The project presents no extraordinary features. The large quantity of water in the river would require special coffer dams and the diversion of so much water to the power plant would require large tunnels with suitable headworks, but these are within ordinary engineering achievements. If the lower railroad were eliminated or raised to an elevation similar to the other, the amount of available power would be increased approximately ten per cent. Section IV of the report shows a difference of 3500 electric horse power, continuous output, when using 5200 cubic feet of water per second. From my study of the possibilities of the site, the most economic development is estimated to be that using a dam having a crest at elevation

820, with power outputs as given in Section IV of the report, and with estimated costs as given by Mr. T. F. Richardson in his deposition to interrogatory 15, which tabulated data I have verified. The character of the development would be the same if the lower railroad were eliminated, the dam being constructed to an elevation 773 with power output from the plant as given under Section IV of the report, and with estimated costs as given by Mr. Richardson.

The location of the Deschutes Railroad along the east bank would tend to make the headworks, tunnel, and pipe line construction much more expensive than if it were not located so close to the construction work of a power development, even to modify the design thereof as well as causing a large reduction in the available head.

CROSS EXAMINATION.

My experience has not been on other projects on the Deschutes River, but on other rivers on the Pacific coast territory and in the east and abroad. For my information in making designs and estimates I relied on the work of Mr. E. A. W. Hammatt, civil engineer, who made the survey for our company. The report was made to determine the power possibilities of the Deschutes River at Sherar Bridge. Such possibilities were found to be limited by the railroad construction, and our later conferences brought out the economy of a higher dam, were the railroads not there located.

(Testimony of Lewis E. Ashbaugh)

Field investigation was made by Mr. Hammatt in January and February, 1910. Preliminary designs and estimates were made in our San Francisco office late in February, and the results were revised and approved by Mr. Richardson in the New York office, and returned to San Francisco early in April for final compilation. Delivery of the report was probably made about the middle of April, 1910. The last paragraph of Section V of the report shows that we did not include real estate and flowage rights in our estimate. The purchase of option of the reservoir area, dam site, or any other land, would not affect our report in any way. We were reporting on the power possibilities of the site, and the estimated cost did not include real estate, as just noted.

I have no special information on the subject of back water condition, but understand there would be no interference with other interests. The market had no consideration, it not being a part of my work in connection with this project. The difference in elevations of railroads at the dam site was found to be eight feet, but a lesser amount some distance upstream. The location of the lower railroad forbids a dam raising the water level 60 feet. I have no sufficient data regarding the back water conditions of the stream. A difference of four feet in an effective head of 82 feet, as available under present railroad conditions, would make a difference of approximately five per cent in power output, or one-half the amount noted in answer to interrogatory 14. Acquirement of proper title to lands and water rights would not in any way affect our report on the power

possibilities of this site, such reports often being made before any titles or even options are obtained and with a view of determining advisability of doing so.

Studies of geological conditions along the Deschutes River indicate that there would be a solid ledge rock formation for a dam at the site selected and that it would not be simply a layer of rock overlying a sand or gravel formation.

While some high head developments have been constructed in Oregon at more economic costs than the one in question, we are not informed as to any more such possibilities, and we consider that there is nothing in the vicinity of this Deschutes River project which would be more economic of development.

C. G. NASH, called and sworn on behalf of defendant, testified as follows:

I am assistant engineer of the O.-W. R. & N. Company and have been in its employ over five years; was employed as assistant civil engineer on the Deschutes line; worked on the location of that line at several points; I was there in the fall and winter of 1908 and 1909 and the summer and fall of 1909; I am familiar with photography and made photographs of nearly all the construction work I have done, covering possibly fifteen years, and I made photographs of the Deschutes railroad and vicinity in the vicinity of Sherar's Bridge; that the photographs marked defendant's exhibits 8 to

(Testimony of C. G. Nash)

34 were made by me and accurately represent the localities shown.

Thereupon exhibits 8 to 34 were offered and received in evidence, and accompany the record herein.

That defendant's exhibits Nos. 8 to 27 were taken in March, 1909, and defendant's exhibits 28 to 34 were taken in September, 1913. Defendant's exhibit 8 is looking up stream from a point about a mile, possibly a mile and a quarter, below Sherar's Bridge. It is about a mile and a half or a mile and three-quarters below the projected dam site of the Interior Development Company, at a point between mile posts 41 and 42 on defendant's exhibit 35, for identification. Defendant's exhibit 9 was taken just south of Buck Hollow, looking up stream showing the lower end of the gorge at engineer's station L-prime, 2215, from the Deschutes railroad side of the river. Defendant's exhibit 10 was taken on the Deschutes Railroad side of the river loowing down stream from engineer's station L-prime 2233, 1800 feet south of Buck Hollow. Defendant's exhibit 11 was taken from the same point as exhibit 10, looking in the opposite direction (up stream) and shows Sherar's house and barn. Defendant's exhibit 12 was taken from engineer's station L-prime 2254, from the Deschutes Railroad side of the river, and shows Sherar's house, looking down stream. Defendant's exhibit 13 was taken just across the river from Sherar's house. Defendant's exhibit 14 was taken on the Oregon Trunk Line side of the river close to the head of the falls.

(Testimony of C. G. Nash)

Defendant's exhibit 15 was taken from the Oregon Trunk Line side of the river, looking almost squarely across the river toward the Sherar Falls. Possibly 500 or 600 feet below the projected dam site of the Interior Development Company. Defendant's exhibit 16 was taken from the Deschutes Railroad side of the river showing the early workings on the projected dam just above the dam site. The grade shown is the Tygh Valley wagon road. Defendant's exhibit 17 was taken from a point above the proposed dam, looking down stream from the Deschutes Railroad side of the river. Defendant's exhibit 18 was taken from engineer's station L-prime 2347 possibly a mile and a quarter above the proposed dam. Defendant's exhibit 19 was taken from engineer's station L-prime 2372 on the Deschutes Railroad side of the river, looking down stream. That is nearly two miles above proposed dam. Defendant's exhibit 20 was taken from the Deschutes Railroad side of the river looking up stream showing the character of the canyon at the mouth of White River. Defendant's exhibit 21 looks squarely across the Deschutes River into the mouth of White River. Defendant's exhibit 22 is taken from the Deschutes Railroad side of the river, looking down stream into the mouth of White River. Defendant's exhibit 23 was taken from engineer's station L-prime 2520, looking down stream about five miles above the proposed dam. Defendant's exhibit 24 was taken from the Deschutes Railroad side of the river, looking down stream about six miles above the proposed dam. Defendant's exhibit 25 was taken from

(Testimony of C. G. Nash)

the Deschutes Railroad side of the river, looking down stream at a point seven miles above the proposed dam. Defendant's exhibit 26 was taken from the same side of the river looking down stream about seven and a quarter miles above the proposed dam. Defendant's exhibit 27 was taken from the same side of the river looking down stream about seven and one-half miles above proposed dam. Defendant's exhibit 28 was taken from the same point as defendant's exhibit 17. Defendant's exhibit 29 was taken from the same point as defendant's exhibit 16. Defendant's exhibit 30 was taken from the Oregon Trunk Line side of the river, possibly 100 feet above the proposed dam, looking down stream. Defendant's exhibit 31 was taken from the same position as exhibit 30, looking in the opposite direction (up stream). The building shown is the Oregon Trunk Line station at Sherar. Defendant's exhibit 32 was taken from the Oregon Trunk Line side of the river, looking across to the Deschutes Railroad side, showing proposed dam on the Deschutes side. Defendant's exhibit 33 was taken from the Oregon Trunk Line side of the river, showing the end of the dam on the Oregon Trunk side. Defendant's exhibit 34 was taken on the Oregon Trunk Line side of the river, looking almost squarely across to the Deschutes Railroad side of the river, and shows the dam and the Deschutes Railroad embankment.

Plaintiff offered in evidence exhibits as follows:

Certified copy of a decision rendered by the Secretary of the Interior on the 16th day of June, 1909, in the case of the Executors of J. H. Sherar vs. A. L. Veazie, which was objected to as set forth in the stipulation of the parties above. Same was received as evidence, marked Plaintiff's Exhibit 9, and is as follows:

PLAINTIFF'S EXHIBIT 9.

DEPARTMENT OF THE INTERIOR

Washington, June 16, 1909.

D 4099

Executors of J. H. Sherar

vs.

A. L. Veazie, Attorney in fact for the Santa Fe Pacific R. R. Co.

MOTION FOR REVIEW.

The Commissioner of the
General Land Office.

Sir:

December 28, 1908, the Department entertained a motion filed by plaintiffs for review of its decision of August 15, 1908, in the case of Executors of J. H. Sherar vs. A. L. Veazie, attorney in fact for Santa Fe Pacific Railroad Company, involving the SE¼ NW¼, NW¼NE¼, Sec. 3, T. 4 S., R. 14 E., and N½SW¼, Sec. 35, T. 3 S., R. 14 E., The Dalles, Oregon.

The papers have been returned with evidence of service, together with reply briefs, etc.

January 26, 1906, the Santa Fe Pacific Railroad Company by A. L. Veazie, attorney in fact, filed selection under the act of June 4, 1897, (30 Sta. 36) for the above described tracts, in lieu of lands relinquished in the San Francisco Mountain Forest Reserve, Arizona. Said act provides:

That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent.

A person applying to select land under this act must swear, among other things, that said land is not occupied in any manner adversely to the selector.

February 13, 1906, the Santa Fe Pacific Railroad Company, by J. H. Sherar, attorney in fact, presented three applications to select under the act of June 4, 1897, which included these same tracts, together with a duly corroborated affidavit of protest: (1) that at the date of the said lieu land selection was made by the said A. L. Veazie no portion of said land was vacant land opened to settlement; (2) that each and every legal subdivision thereof was at the date of said selection occupied by said protestant under a claim of ownership, and had been so occupied for more than four years prior to the date of said selection; (3) that no portion of said above described tracts at the date of said selection was vacant land open to settlement, but each and every sub-

division thereof was and had been occupied and in the exclusive possession of the protestant for more than twenty-five years prior to the date of said selection.

The applications of Sherar were rejected by the local officers for conflict with the prior lieu selection by A. L. Veazie, from which action Sherar appealed.

Your office ordered a hearing "to determine whether or not the land involved . . . . was vacant public land subject to selection under the act of June 4, 1897 (30 Stat. 36) at the time the application of the Santa Fe Pacific R. R. Co. by A. L. Veazie, as attorney in fact, was filed in the local office."

The hearing was had, all parties appearing in person and by attorney. The decision of the register was as follows:

From the testimony presented in this case it appears that the protestant was not in actual possession of the land involved at the date said selection was filed, and that the land was vacant Government land subject to entry by the first qualified applicant therefor. I am therefore of the opinion that said selection should not be cancelled.

The Receiver decided as follows:

From the testimony presented in this case it appears that the protestant was an actual adverse occupant of said lands at the date of selection; that said lands were not subject to entry by the selector at date of filing application to select on account of the adverse occupancy

of the protestant. I am therefore of the opinion that said selection by said company should be cancelled.

In the meantime J. H. Sherar died testate. The executors of his will intervened and appealed to your office from the register's decision. An appeal was likewise taken by the opposite party from the receiver's decision. Your office, in decision of April 9, 1908, after stating that Sherar many years ago had purchased the rights to a bridge and to certain toll roads—two of which crossed the land in controversy—and was the owner of thousands of sheep, found:

At certain seasons of the year, among other places used for similar purposes, the protestant used the land in controversy for grazing, bedding, salting and feeding his sheep which ranged over hundreds of acres. There have never been any buildings, enclosures or fences on the land embraced in the lieu selection mentioned. It has never been cultivated and it is not susceptible of cultivation. Because of the existence of the toll roads mentioned and protestant's unlawful use of the land, it is claimed for him that he was in actual possession of the land and therefore that such land was not vacant and unoccupied. Such a contention has no force. The protestant and his counsel seem to have considered that the words "use" and "possession" or "occupancy" are synonymous, but they are widely divergent in their meaning. The toll roads mentioned gave the protestant nothing more than a right of way over public land, and his unauthorized use occasionally of the land for sheep grazing, etc., was in no sense an occupancy or even pos-

session of the land, and there was no condition, as shown by the testimony, that could defeat the right of the Santa Fe Pacific R. R. Co., by A. L. Veazie, its attorney in fact, to select the land on January 26, 1906, under the aforesaid act of June 4, 1897. . . . There was no evidence of occupancy of the land selected, and there were no signs of settlement or improvements, therefore there was nothing of which the selector could be charged with notice. It is unmistakably shown that Sherar had no color of title to the land and that he was not in a position to assert any claim or title thereto.

Your office accordingly affirmed the decision of the register and upon appeal the Department affirmed the action of your office in the decision now under review, in which it was found, among other things: "Sherar has not shown color of right or occupancy of the land, except as nomad bands of sheep occasionally passed and pastured over it."

The essential question for determination is, whether or not the land was vacant and unoccupied, and thus subject to selection under the act of June 4, 1897, at the time application to select was filed in the local office by the Santa Fe Pacific Railroad Company, A. L. Veazie, attorney in fact.

The lands in controversy are situated in the canyon of the Deschutes River. They are mostly rocky lands and the walls of the canyon are very precipitous, so much so that ingress and egress are rendered practically impossible except through side canyons or over especially constructed roads. The land is not valuable for culti-

vation, but does possess some value for grazing purposes. It appears to be impracticable to enclose the lands in the canyon with fence on account of their broken character, and in fact it is unnecessary to enclose them with fence because of the natural barriers. On the northwest northeast quarter of Section 3, near the north line, are located falls in the Deschutes River, in which apparently lies the chief value of the land, so far as this controversy is concerned.

In 1871, J. H. Sherar bought out the interest of a predecessor, the purchase including a toll bridge across the Deschutes River, and his place was thereafter known as Sherar's Bridge. The land at the time was not surveyed. According to his statement, he paid six thousand dollars "for the road and the land rights; I paid six thousand dollars for the road and the land along the river there." Sherar claimed that the land included in his purchase was "that along up and down the river from the mouth of White River down to the mouth of Buck Hollow." After the public surveys were extended over that section of country, Sherar made homestead entry for the SE¼ Sec. 34, T. 3 S., R. 14 E. At the time he made such entry he supposed that it included the falls in the river, and not until 1901 did he discover that the south line of his homestead did not run south of said falls. He then took steps to acquire title to the land upon which the falls are situated, as well as the SE¼NW¼ Sec. 3, and the N½SW¼ Sec. 35. He already owned, in addition to his homestead, the SW¼ NE¼ Sec. 3, and other lands up the Deschutes River toward the mouth of White River.

The lands in question were included in a selection list, of the State of Oregon. They were sold by the State to Annette Mitchell, a clerk in the office of Sherar's agent at The Dalles, who assigned her certificate to Sherar June 7, 1901. From that time until Veazie's selection, it appears that Sherar believed that he was the owner of these tracts, or was in a position to acquire title thereto. The State selection was held for cancellation May 21, 1903. Sherar surrendered his sale certificate and applied for repayment March 8, 1904, which the State made March 22, 1904. He testified that when he signed this application for repayment he did not know that it referred to these lands in the canyon. He was quite old, and his agent at The Dalles was looking after many other lots for him. He is corroborated in his statement by the testimony of his wife, who appears to have been the principal factor in the transaction of his business. The fact that Sherar surrendered the certificate of sale and applied for repayment under a cancelled State selection is not regarded as proof that he abandoned claim to the land, or that he was estopped thereby from asserting occupancy claim against the Veazie selection.

From 1871 Sherar and his claim continued to reside in the canyon, and to use and occupy the lands therein, both above and below the bridge, until his death. He was engaged in building and repairing roads and in the sheep business. These lands were used by him in the same way as the lands embraced in his homestead, which was not fenced because it was deemed unnecessary on account of the character and location of the land.

He supposed he owned the NW¼NE¼ Sec. 3, on which the falls are located, because in his original purchase he had paid for the possessory right thereto, along with other lands. The forty was crossed by his toll roads on both sides of the river. He had, and used, a private road on the east side of the river, between the toll road and the river. On the west side and near the falls he for many years maintained a hydraulic ram for the purpose of supplying his home with water. A wing dam, about one hundred feet in length, was built out into the river. This forty was also used by Sherar as a feeding and bedding ground for his sheep. He also built a fish house, with a canal or flume leading thereto. The remains of these improvements may still be seen. The N½SW¼ Sec. 35 is about equally divided by the Deschutes River. The N½ of the eighty is practically inaccessible except through an enclosure on Sherar's homestead, and was used by him as a hog pasture and lambing ground. It was also used as a place for catching drift wood coming down the river, and a private roadway was constructed by Sherar which ran nearly to the center of Sec. 35 and over which he hauled drift wood and feed for his sheep. The south of the eighty was used principally for grazing purposes.

The evidence shows that Sherar used the lands for the purposes for which they were best adapted. His sheep grazed over them and other lands owned by him, as well as over the public domain. But this was not the only use to which he put them. On account of the natural shelter from storms and cold weather afforded by the canyon, the lands were used and occupied during

the lambing season, and his sheep were salted and bedded there. While his sheep grazed over the public lands, as did those of other owners, yet his homestead and these lands were the headquarters, so to speak, of his sheep industry. The sheep were collected and held there when it was necessary to feed them. Therefore the use of the land extended further than an occasional grazing place for his sheep, as heretofore found. The impression gained from statements contained in the decisions complained of is, that these lands constituted part of a vast grazing tract, over which pastured the sheep of different owners, and that Sherar's occupancy thereof was merely such as his occupancy of other public lands. The evidence is to the contrary, showing that the lands are in a practically inaccessible canyon, on which there is comparatively little grass, and that Sherar's occupancy has been exclusive. The lands were generally recognized as belonging to or claimed by him; not only that, but they were so recognized and treated by the Interior Development Company, the ultimate beneficiary of the Veazie selection. In 1905, after looking over the premises, a representative of that company offered Sherar sixty thousand dollars for his holdings, including the lands in controversy. Again, in 1906, an option for five thousand dollars was executed by Sherar and his wife agreeing to convey their holdings to a representative of the Interior Development Company, for a consideration of seventy-five thousand dollars. This option covered all the lands in the canyon from Buck Hollow to the mouth of White River. The option was never exercised, it evidently being considered that possession of the valu-

able water power site could be secured at less cost through other means. The transaction shows, however, that the parties interest in the Veazie selection had full knowledge of the status of the lands in the canyon, and but confirms Sherar's claim of occupancy. There was evidently something on or in connection with these lands which charged parties with notice of Sherar's claim thereto. This is evidenced by the attempt to purchase his rights before the Veazie selection was made.

It is not deemed necessary in this connection to discuss at any length the rules and decisions governing determination of what is or is not "vacant land" within the meaning of the law generally, or under the particular Act of June 4, 1897. It is well settled under the authorities that any visible or notorious acts clearly evidencing an intention to claim ownership are sufficient to establish adverse possession. For this purpose there need not be a fence, building or other improvements. If a person claiming land exercises acts of ownership over it, using it for the purposes to which it is adapted, he may be regarded as in actual occupancy. In the case of Jones vs. Arthur (28 L. D., 234) it is said:

It is true that the tract has been only partially improved and cultivated, but it had been used and occupied in connection with other lands for twenty-three years preceding the entry of Arthur, by those who beyond question must have believed their title to be good particularly as warranty deeds were passed by the State.

To be vacant the land must not be occupied by others. Kern Oil Company et al. vs. Clarke (30 L. D., 550) and Gray Eagle Oil Company vs. Clarke (30 L.

D., 570). In the case of Litchfield et al. vs. Anderson (32 L. D., 298) it was said:

If the land be actually occupied, it is not vacant. Whether the occupancy is such as meets the requirements of the homestead or other laws or whether the occupant is qualified to assert and maintain a claim under those laws are questions which will not be tried and determined under an application to select the land under the act of 1897. It is clear that this land showed evidence of occupancy when the non-occupancy affidavit in support of Litchfield's application was executed and when that application was presented the occupant was yet in possession of the land and improvements. The conditions were such as to justify your conclusion that the signs of settlement and improvement were sufficient to charge the selector with notice thereof. Under the rulings of the Department land in the condition of this is not "vacant" within the purview of the act of 1897.

Under the authorities and decisions applicable to this case, the Department is convinced that the land in controversy was not "vacant" land within the meaning of the act of June 4, 1897, at the time of the Veazie selection. Departmental decision of August 15, 1908, is accordingly recalled and vacated, and the decision of your office herein is reversed.

The papers are herewith returned.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary

United States Land Office at
The Dalles, Oregon, April 4, 1914.

I, H. Frank Woodcock, do hereby certify that I am the Register of the United States Land Office at The Dalles, Oregon, and as such Register I have the custody of the records and papers of said office; that as such Register I have compared the foregoing copy of departmental decision dated June 16, 1909, with the original thereof, on file in this office, and that the same is a true and correct copy thereof and the whole thereof.

H. FRANK WOODCOCK, Register.

Plaintiff offered a certified copy of notice of appropriation of water of the Deschutes River by the Interior Development Company, made the 4th day of December, 1908, which was objected to by defendant on the ground that same is irrelevant and immaterial, has long since expired, and is not now valid in any wise. Same was received and marked Plaintiff's Exhibit 19, and is as follows:

PLAINTIFF'S EXHIBIT 19.

Notice of Appropriation of Water on the Deschutes River by the Interior Development Company.

To Whom it May Concern:

The Interior Development Company, a corporation organized and existing under the laws of the State of Oregon and having its principal office and place of business in the City of Portland, County of Multnomah, State of Oregon, and having title and possessory right and to land hereby give notice, that the said Company hereby appropriates water rights and reservoirs sites as hereinafter described and hereby appropriates Five

Hundred Thousand (500,000) cubic inches by miner's measurements under a 6-inch pressure ten thousand second feet, of water on the Deschutes River, Wasco County, Oregon, for the purpose of irrigation of and the reclamation of arid lands within the State of Oregon, for the purpose of mining, domestic and municipal uses and also to furnish electric power for all purposes and to transmit the same within the State of Oregon as provided for by the laws of said State, point of diversion.

The point of diversion of the said water and the location of the in-take head gates, and where this notice is posted is at a point on the right bank of the Deschutes River in Section 3, Township 4 South, Range 14 East of Willamette Meridian, Wasco County, State of Oregon, said location being 600 feet south of the section and township line, said line being between sections 34 and 35 of Township 3 south of range 14 East of Willamette Meridian, and sections 2, 3 of Township 4 South of Range 14 East of Willamette Meridian and said location being 40 feet south of said township line.

Reservoir: There is to be one reservoir which is to be located in Sections 3, 8, 9, 10, 16 and 17 of Township 4, South of Range 14 East of Willamette Meridian.

General Description: The appropriation and diversion of the said amount of water and also the reservoir site will be developed as follows: By construction of a dam of at least sixty feet in height about low water mark, across the said Deschutes River at a point about 200 feet up stream from the intake head gate by the construction of a part of the way by the canal, or part of the way of

flumes, or part of the way of pipe line, as may be deemed the most practicable and economical along the right bank of the said Deschutes River below said dam for a distance of 4000 feet, beginning of the said head gate by construction of a power house and the installation of hydro electric machinery at the power house site which is on the north half of the southwest quarter of section 35, township 3 south of Range 14 East of the Willamette Meridian.

The general course and direction of above ditch flume and pipe line is shown by the map accompanying this notice and extends from said point of diversion in a northerly direction, bending Eastward towards the end, following, as closely as practicable, the right bank of the Deschutes River of the Terminus as above described. And said corporation claims ground sufficient to construct a reservoir, dam, power house, flume and pipe line.

Name of said Ditch, Flume and Pipe Line.

The name of the said ditch, flume and pipe line is to be known as the Willow Flume and Pipe Line.

Dimensions.

The dimensions of said ditch are as follows: At intake 85 feet wide at the top and bottom and 30 feet deep and thereafter the ditch will be 85 feet wide at the top and 70 feet wide at the bottom and 15 feet deep for a distance of about 4000 feet and for a distance of about 1220 feet there will be used 8 parallel pipe, each 11 feet in diameter.

Owner.

The owner of said canal, ditch and pipe line is the undersigned, the Interior Development Company its successors and assigns.

This notice is posted on the 7th day of December, 1908, at the hour 8:15 o'clock A. M. in the presence of A. D. H. Hancock.

By J. R. THOMPSON.

In Witness Whereof the Interior Development Company pursuant to the resolution of its Board of Directors duly and legally adopted has caused this notice to be signed by its President as for its act and deed and its Corporate Seal to be hereto affixed this 4th day of December, A. D. 1908.

INTERIOR DEVELOPMENT CO.,
By A. WELCH, Pres.

(No Corporate Seal)

State of Oregon,)
) ss.
County of Multnomah.)

This certifies, on this 5th day of December, A. D. 1908, before me, Gabrielle Clark, Notary Public in and for said County and State personally appeared the within named, A. Welch, President of the Interior Development Company a Corporation, to me known to be the identical person described in and who executed the foregoing instrument and map accompanying the same and he then and there acknowledged to me that as such officer of such corporation he *instuted* the said instrument and

map as a free and voluntary act and deed of said corporation, and for the purposes therein set forth and that he affixed thereto the corporate seal of said corporation pursuant to the resolutions of its Board of Directors duly and legally adopted.

In Testimony whereof, I have hereunto set my hand and affixed my Notarial seal the day and year above named.

(Signed) GABRIELLE CLARK,
Notary Public for Oregon.

(Notarial Seal)

State of Oregon,)
)ss.
County of Multnomah.)

I, J. R. Thompson, being first duly sworn on my oath depose and say that the foregoing notice and the notice in all respects exactly the same came in my hands to-wit: The seventh day of December, 1908, and I posted the said notice on the said day at the hour of 8:15 o'clock A. M. on a conspicuous place on a board fastened to the rocks at the point of diversion mentioned in the said Notice, and the posting was done by the direction of and on behalf of the Interior Development Company as its act.

J. R. THOMPSON.

Subscribed and sworn to before me this 8th day of December.

GABRIELLE CLARK,
Notary Public for Oregon.

(Notary Seal)

State of Oregon,)
) ss.
County of Wasco.)

I, L. B. Fox, County Clerk and Ex-Officio Clerk of the Circuit Court, do hereby certify that the foregoing copy of Notice of Appropriation of water by the Interior Development Company has been by me compared with the original now of record in my office, and that the same is a full, true and correct transcript therefrom and of the whole of said original, as the same appears of record in my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and official seal, this the 17th day of November, A. D. 1913.

L. B. FOX,
County Clerk.

(SEAL)

Plaintiff offered in evidence a Memorandum of Agreement made the 30th day of July, 1910, between the Eastern Oregon Land Company and the Oregon Trunk Railway, giving to the Eastern Oregon Land Company certain rights over the lands of the Oregon Trunk Railway adjoining the lands in controversy here for flowage and the construction of a power plant, which was received without objection and marked Plaintiff's Exhibit 20, and accompanies this record.

Plaintiff offered in evidence three patents of the United States to the Santa Fe Pacific Railroad Company, the first being for Lot 2 of Section 3, in Township 4 South, Range 14 East of the Willamette Meridian,

and marked Plaintiff's Exhibit 21; the second being from the United States to the same patentee for the north half of the southwest quarter of Section thirty-five, in Township three South, Range fourteen East of the Willamette Meridian, and marked Plaintiff's Exhibit 22; and the third being for the southeast quarter of the northwest quarter of Section three, Township four South, Range fourteen east of the Willamette Meridian, and marked Plaintiff's Exhibit 23; all dated the 26th day of February, 1913; to which patents the defendant objected on the ground that the same bear a reservation appearing on the face thereof, and that said patents were issued subject to the right of way claimed by the defendant, and that the exhibits were at variance to the allegation of the complaint. Said instruments were received and accompany the record.

Plaintiff offered in evidence the original option given by J. H. Sherar and Jane A. Sherar, husband and wife, to J. C. Hostetler, dated January 27, 1906, which was received without objection and marked Plaintiff's Exhibit 24, which is as follows:

PLAINTIFF'S EXHIBIT 24.

State of Oregon,)
) ss.
County of Wasco.)

I, L. B. Fox, County Clerk and Ex-officio Clerk of the County Court, do hereby certify that the foregoing copy of Agreement to Sell, from J. H. Sherar and Jane A. Sherar....to....J. C. Hostetler....has been by me compared with the original....Agreement to Sell....

now of record in my office, and that the same is a full, true and correct transcript therefrom and of the whole of said original, as the same appears of record in my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and official seal, this the 14th day of April, A. D. 1914.

L. B. FOX,
County Clerk.

Seal.

J. H. Sherar et ux....to....J. C. Hostetler.

Agreement to Sell.

Filed for Record June 18th, 1906, 1 P. M.

Know all men by these presents, that we, J. H. Sherar and Jane A. Sherar, husband and wife, in consideration of Five Thousand Dollars to us in hand paid by J. C. Hostetler, the receipt whereof is hereby acknowledged, do hereby give and grant unto the said J. C. Hostetler, his heirs and assigns, the right and privilege of purchasing all of the following described land, situated in Wasco County, Oregon, to-wit: West half of the southwest quarter of Section Twenty-seven, the southeast quarter of Section Thirty-four, and the North half of the southwest quarter of Section Thirty-five, all in Township Three South, Range Fourteen East W. M. West half of the east half, south half of the Northwest quarter and the east half of the southwest quarter of Section Three, and Northwest quarter, and the Northwest quarter of Southwest quarter of Section Ten, all in Township Four South, Range Fourteen

East W. M. For said consideration the further right and privilege is hereby given and granted of purchasing by the said J. C. Hostetler, his heirs, executors, administrators and assigns of all right, title and interest that we or either of us now have or may hereafter acquire under the laws of the State of Oregon or otherwise of appropriating water from the Deschutes River for the purpose of furnishing electrical power for any and all purposes and all water rights connected with said stream of any kind that we or either of us may now have or hereafter acquire within the life of this option, and all right to condemn rights of way and riparian rights, and for said consideration the right and privilege is hereby conferred of purchasing all of the stock which we or either of us now own in the Tilkenny Road and Bridge Company, a corporation organized under the laws of the State of Oregon, and Tygh and Grass Valley Road Company, a corporation organized and existing under the laws of the State of Oregon, it being understood that the stock herein referred to amounts to ninety-nine shares in each Company.

The right and privilege of purchasing said property by the said J. C. Hostetler, his heirs and assigns, is to be exercised on or before November 1st, 1906, and if not exercised within said time then the consideration paid for this option is to be forfeited, and the said J. C. Hostetler, his heirs, executors, administrators and assigns have no further right under this option.

If the said J. C. Hostetler, his heirs, executors, administrators or assigns shall elect to purchase said prop-

erty and shall pay to us Seventy Thousand Dollars in cash at the time of making his said election, we, the said J. H. Sherar and Jane A. Sherar, hereby undertake and agree that we will by a good and sufficient warranty deed convey to the said J. C. Hostetler, his heirs or assigns, the above described real property free from all incumbrance whatever, and will transfer to him all of our water rights and privileges above mentioned and also all of the certificates of stock in said corporation above referred to.

During the life of this option the said J. C. Hostetler, his legal representatives and assigns, shall have the privilege of entering upon any of the above described premises, and there do any act necessary or convenient to enable him or them to determine the value of said premises for the purpose of using the water of the Deschutes River for generating electrical power for all purposes.

In testimony whereof, we have hereunto set our hands and seals this 27th day of January, 1906.

J. H. SHERAR (Seal)
JANE A. SHERAR (Seal)

Executed in the presence of:

B. S. HUNTINGTON, C. H. LOGUS.

State of Oregon,)
)ss.
County of Wasco.)

On this 27th day of January, 1906, personally appeared before me, a Notary Public within and for said

County and State, the above named J. H. Sherar and Jane A. Sherar, husband and wife, to me known to be the individuals described in and who executed the foregoing instrument and they acknowledged to me severally that they executed the foregoing instrument freely and voluntarily for the uses and purposes therein mentioned.

In Testimony Whereof, I have hereunto set my hand and affixed my notarial seal on this the day and year last above mentioned.

B. S. HUNTINGTON,
Notary Public for Oregon.

(Notary Seal)

In connection therewith it was stipulated that the same was recorded on the 18th of June, 1906, in Book 42 of Deeds, at Page 91, of the Records of Wasco County, and on the 23rd day of June, 1906, in Book L of Deeds, at Page 534, of the records of Sherman County.

Plaintiff offered in evidence a modification of said option, dated the 9th day of February, 1906, which was received without objection and marked Plaintiff's Exhibit 25, and is as follows:

PLAINTIFF'S EXHIBIT 25.

THIS AGREEMENT, entered into this 9th day of February, 1906, between J. H. Sherar and Jane A. Sherar, husband and wife, the parties of the first part, and J. C. Hostetler, the party of the second part,

WITNESSETH: Whereas, it has been discovered since the execution of a certain agreement made and

entered into by and between the parties hereto on the 27th day of January, 1906, whereby the parties of the first part gave to the party of the second part an option to purchase certain real property therein described, that the title of the parties of the first part to certain portions of the tracts covered by said option has not been perfected.

Therefore, in consideration of the premises it is hereby mutually agreed that said option may be exercised by the party of the second part at any time within nine months from the time the parties of the first part shall have perfected their title to all of said land covered by said option, and that the time limit of said option, which is mutually agreed to be nine months, shall not begin to run until the parties of the first part shall have so perfected their title.

In Witness Whereof, the parties hereto have hereunto set their hands and seals this 9th day of February, 1906.

J. H. SHERAR (Seal)
JANE A. SHERAR (Seal)
J. C. HOSTETLER (Seal)

Executed in the presence of

B. S. HUNTINGTON,
M. G. MACK.

State of Oregon,)
) ss.
County of Wasco.)

On this 9th day of February, 1906, personally appeared before me J. H. Sherar and Jane A. Sherar, hus-

band and wife, personally known to me to be the same persons described in and who executed the foregoing instrument, and they acknowledged to me severally that they executed the same freely and voluntarily for the uses and purposes therein named.

Witness my hand and official seal the day and year first above written.

B. S. HUNTINGTON,
Notary Public for Oregon.

(Seal)

Plaintiff offered in evidence an assignment of said option from Hostetler to Laughlin, dated April 14, 1909, which was received without objection and marked Plaintiff's Exhibit 1, and is as follows:

PLAINTIFF'S EXHIBIT 1.

KNOW ALL MEN BY THESE PRESENTS, That I, J. C. Hostetler, for a valuable consideration to me in hand paid by B. F. Laughlin, the receipt of which is hereby acknowledged, have bargained and sold and do hereby grant, bargain, sell and assign to the said B. F. Laughlin, the right and privilege of purchasing the west half of the southwest quarter of section twenty-seven (27) the southeast quarter of Section thirty-four (34) and the north half of the southwest quarter of section thirty-five (35) all in township three (3) South, Range fourteen (14) East Willamette Meridian; and also the west half of the east half the south half of the northwest quarter, and the east half of the southwest quarter of section three (3), the northwest quarter, and the north-

west quarter of the southwest quarter of section ten (10) all in township four (4) South, Range fourteen (14) East Willamette Meridian; the same being the right and privilege granted to the undersigned J. C. Hostetler, by J. H. Sherar and Jane A. Sherar, husband and wife, by instrument in writing dated the 27th day of January, 1906, recorded on page 524 of Book "L" of deeds of Sherman County, Oregon, and which right and privilege was extended by agreement between the said Sherar and wife and the undersigned dated the 9th day of February, 1906.

In testimony whereof, I have hereunto set my hand and seal this the 14th day of April, A. D. 1909.

J. C. HOSTETLER, (Seal)

Executed in presence of:

WIRT MINOR,
A. B. WINFREE.

State of Oregon,)
) ss.
County of Multnomah.)

This Certifies, that on this 14th day of April, A. D. 1909, before me, the undersigned, a notary public in and for the State of Oregon, personally appeared the within named J. C. Hostetler, who is personally known to me and to me known to be the identical person described in and who executed the within instrument, and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In Testimony Whereof, I have hereunto set my hand and affixed my notarial seal this the day and year last above written.

A. B. WINFREE,
Notary Public for Oregon.

(Notarial Seal)

Plaintiff offered in evidence a profile, which was received without objection and marked Plaintiff's Exhibit 31, and accompanies this record.

Plaintiff offered in evidence the J. G. White & Co. report and the map attached to the deposition of Mr. Richardson; which was objected to by defendant as immaterial and irrelevant on the ground that the plaintiff has not shown any right to construct a dam of the nature called for in that report. Said papers were received in evidence and marked Plaintiff's Exhibit 38, and accompany this record.

Defendant offered in evidence the original complaint filed in this case April 18, 1910, which was received in evidence, marked Defendant's Exhibit E2, and is as follows:

In the Circuit Court of the United States for the District of Oregon.

Eastern Oregon Land Company, a Corporation,
Complainant,

vs.

Deschutes Railroad Company, a corporation,
Defendant.

To the Honorable Judges of the Above Entitled Court:

Eastern Oregon Land Company, a corporation organized under the laws of the State of California, brings this its bill of complaint against Deschutes Railroad Company, a corporation organized under the laws of the State of Oregon, as defendant, and for its cause of suit humbly showeth unto your Honors.

I.

Complainant is a corporation duly organized under and by virtue of the laws of the State of California, and has its principal office and place of business in the City of San Francisco, and State of California, and is a citizen of the State of California within the meaning of the Acts of Congress of the United States prescribing the jurisdiction of the Circuit Courts of the United States.

II.

The defendant is a corporation organized under the laws of the State of Oregon, and has its principal office and place of business in the City of Portland in the State of Oregon, and is a citizen of the State of Oregon within the meaning of the Acts of Congress of the United State prescribing the jurisdictions of the Circuit Courts of the United States.

III.

The complainant has complied with all the laws of the State of Oregon prescribing the terms and conditions under which foreign corporations may transact

business within the State of Oregon, and is engaged in business in the State of Oregon, and has been engaged in business in the State of Oregon at all the times in this, its bill of complaint, mentioned.

IV.

Complainant is the owner of and is in possession of certain lands situated in the State of Oregon, particularly described as follows:

The West half of the southwest quarter of Section twenty-seven (27), the southeast quarter of Section thirty-four (34), the northwest quarter of the northeast quarter of Section thirty-four (34), the north half of the southwest quarter of Section thirty-five (35), all in Township three (3) south, Range fourteen (14) east of the Willamette Meridian; also,

Lot two (2), the same being the northwest quarter of the northeast quarter of Section three (3), the southwest quarter of the northeast quarter of Section three (3), the west half of the southeast quarter of Section three (3), the east half of the southwest quarter of Section three (3), the southeast quarter of the northwest quarter of Section three (3), the northwest quarter of Section ten (10), the northwest quarter of the southwest quarter of Section ten (10), the north half of the southwest quarter and the northwest quarter of the southeast quarter of Section nine (9), the northeast quarter of the southeast quarter of Section eight (8), all in Township four (4), Range fourteen (14) east of the Willamette Meridian; and also,

The right to use so much of the banks of the Deschutes River where the same crosses or touches the northwest quarter of the southeast quarter of Section thirty-five (35), in Township three (3) south, Range fourteen (14) east of the Willamette Meridian, as may be necessary or convenient in the development of power on the Deschutes River above or below said northwest quarter of the southeast quarter of Section 35, in Township 3 south, Range 14 east of the Willamette Meridian, and also a right of way across said northwest quarter of the southeast quarter of Section thirty-five (35), in Township three (3) south, Range fourteen (14), east of the Willamette Meridian, for pipe lines, canals and flumes on such line as the complainant may select for the same.

Complainant showeth unto your Honors that said lands lie upon both sides of the Deschutes River in the State of Oregon; that the same were purchased by complainant for the purpose of constructing and installing thereon a plant for the generation of power for manufacturing purposes and for sale, and complainant has for some time past, and prior to the committing of the acts herein complained of, been engaged in the construction of a plant for generating power upon said lands, and has expended large sums of money to this end, and at the time that the acts hereinafter complained of were committed, was actually engaged in the prosecution of said work.

V.

Notwithstanding the rights of your orator, and its ownership of said land, the defendant, without authority

from complainant, and without right, and against the protest of complainant, has entered upon the lands of complainant above described and is now engaged in the construction of a railway over and across said lands; that said railway is so located that the construction over said lands will absolutely prevent the complainant from building a dam in the Deschutes River on its said lands to a height exceeding sixty feet, and thereby the power which the complainant will be able to generate by means of the waters of the Deschutes River on the lands above described will be greatly impaired and the cost of the power will be greatly enhanched and the maintenance and operation of said power plant when constructed will be greatly obstructed and imperiled.

VI.

Complainant further showeth unto your Honors that no agreement has been made with your orator as to the compensation to be paid for building said railway over said lands, and that no compensation or damages have been tendered to your orator, or to any one, for the taking of or injury to its property above described, and no permission has been given by your orator, or by any one, to enter upon said lands, or to build a railroad over the same.

VII.

Complainant further showeth unto your Honors that the defendant in constructing the railroad over the lands above described, has taken large quantities of earth and stone from the line of railway which the defendant is

constructing, and has thrown the same over the banks of the Deschutes River on the work now being prosecuted by your orator, and has seriously interfered with the work of constructing and installing a power plant on said river, which your orator is now prosecuting, and threatens to, and unless restrained by your Honors, will continue to, take earth and stone and cast the same upon the ground upon which your orator is engaged in constructing said power plant, and will thereby seriously hinder and delay your orator in the prosecution of its work and prevent your orator from completing its power plant until the said railway is completed, and even after said railway is completed and construction of your orator's dam and power plant will be greatly interfered with and imperiled by slides caused by the building of said railway and by the maintenance and operation of said railway; that your orator has protested against the building of said railway and particularly against the building of the said railway where the same is located over the lands of your orator, and has forbidden the entry and trespass on its lands above described for the construction of said railway unless and until full compensation be fixed and paid to your orator, but defendant, notwithstanding, continues to enter upon and trespass on said lands, and to construct said railway over the same. and to interfere with and obstruct the work on its said lands in which your orator is now engaged, and defendant will, unless inhibited therefrom by order of your Honors, continue to enter and trespass on your orator's said lands and build said railway over and across the same in the manner in which defendant has hitherto en-

tered upon said lands and constructed said railway, and interfere and hinder the work which your orator is now prosecuting on its said lands, and will impair the said power plant and greatly enhance the cost of generating and developing said power and permanently injure said lands of complainant and thereby complainant will be irremediably injured and damaged.

VIII.

The complainant further showeth unto your Honors that the defendant is attempting to take, use and occupy for railway purposes a strip of land about one hundred (100) feet in width along the bank of the Deschutes River as the same flows through the lands of your orator above described and other lands for station grounds, comprising altogether a tract of land of about forty-five (45) acres; that the value of said lands which the defendant is undertaking to occupy is in excess of two thousand dollars, and that the construction of a railway over and across the said lands of your orator would greatly injure and damage the other lands of your orator not sought to be taken, and would, as above stated, impair the power which your orator is able to develop by means of the flow of the waters in the Deschutes River over said lands, and that your orator will be damaged in a sum far in excess of two thousand dollars if the defendant be permitted to trespass upon your orator's lands, and that the amount involved in this controversy is more than two thousand dollars, exclusive of interest and costs. And complainant further showeth unto your Honors that it has no plain, adequate or speedy remedy at law,

and is unable, by reason of the circumstances above alleged, to prevent, without the assistance of a Court of Equity, the injuries and damages herein complained of, or to protect its property from the unlawful acts of the defendant, and must therefore seek relief in equity whereof such matters are properly cognizable and relievable.

For as much therefore as your orator is remediless in the premises at and by the strict rules of common law, and is only relievable in a court of law where matters of this kind are properly cognizable and relievable, it prays aid of this Honorable Court that a writ of injunction issue out of and under the seal of this Court, or be issued by one of your Honors, according to the form of the statute as in such case may be provided, commanding and enjoining, restraining and prohibiting the defendant and each and all of the servants, agents, employes, attorneys and all persons acting by and through the authority or the direction of the defendant from entering upon and trespassing upon the lands of your orator above described, or any thereof, and from constructing or building a railroad over the same, and from interfering with the possession thereof by your orator, and from interfering with the enjoyment of said lands by your orator pending the determination of this suit, and that upon the final hearing of this cause such injunction be made perpetual, and that your orator may have such further and other relief in the premises as the nature and circumstances of this cause may require and as to your Honors shall seem meet, and may it please your Honors to grant unto your orator a subpoena of the United

States of America issued out of and under the seal of this Honorable Court directed to the defendant therein and thereby commanding the defendant for a day certain therein to be named and under a certain penalty to be and appear before this Honorable Court then and there to answer, but not under oath, an answer under oath being expressly waived, all and singular the premises, and stand to and perform and abide by the said order and direction and decree as may be made against the defendant in the premises and as shall seem meet and agreeable to equity and to good conscience, and your orator as in duty bound will ever pray, etc.

(Sgd.) J. N. TEAL
" WIRT MINOR
" A. B. WINFREE.
Solicitors for the Complainant.

United States of America,)
) ss.
State and District of Oregon.)

Geo. W. Berrian, being first duly sworn, says that he is Agent of the complainant in the foregoing bill of complaint, and makes this affidavit on behalf of the complainant for the reason that neither the President, Secretary nor other officer of the complainant is within the State or District of Oregon; that he has read the foregoing complaint and knows the contents thereof; that the allegations therein contained, as far as they relate to the action of others, he believes them to be true, and in regard to all matters and things in the foregoing bill of complaint alleged which are not within the personal

knowledge of this deponent, the deponent has been fully informed and believes that the same are true.

(Sgd.) GEO. W. BERRIAN.

Subscribed and sworn to before me this 12th day of April, 1910.

(Sgd.) W. A. JOHNSON,
Notary Public for Oregon,
Residing at Portland, Oregon.

(SEAL)

Defendant offered in evidence the first amended bill of complaint in this cause, filed June 4, 1910, which was received and marked Defendant's Exhibit F 2, and is as follows:

In the Circuit Court of the United States for the District of Oregon.

Eastern Oregon Land Company, a corporation,
Complainant,

vs.

Deschutes Railroad Company, a corporation,
Defendant.

To the Honorable Judges of the Above Entitled Court:

Eastern Oregon Land Company, a corporation organized under the laws of the State of California, brings this its amended bill of complaint against Deschutes Railroad Company, a corporation organized under the laws of the State of Oregon, as defendant, and for its cause of suit humbly showeth unto your honors:

I.

Complainant is a corporation duly organized under and by virtue of the laws of the State of California, and has its principal office and place of business in the City of San Francisco, and State of California, and is a citizen of the State of California within the meaning of the Acts of Congress of the United States prescribing the jurisdiction of the Circuit Courts of the United States.

II.

The defendant is a corporation organized under the laws of the State of Oregon, and has its principal office and place of business in the City of Portland in the State of Oregon, and is a citizen of the State of Oregon within the meaning of the Acts of Congress of the United States prescribing the jurisdiction of the Circuit Courts of the United States.

III.

Complainant further showeth unto your Honors that long prior to the organization of the defendant as a corporation, and to the location of the defendant's line of railway across the lands of complainant, complainant filed with the Secretary of State of the State of Oregon, duly certified copy of its articles of incorporation and a power of attorney whereby it appointed an agent in the State of Oregon upon whom service of summons might be had, and paid to the State of Oregon all sums of money required by the laws of the State of Oregon to be paid by foreign corporations so as to authorize such

corporations to transact business in this State, and in all respects complied with all the statutes of the State of Oregon regulating the admission of foreign corporations to do business in the State of Oregon, and has at all times paid all license fees and other sums required of it by the State of Oregon for such purpose, and is entitled to do business in the State of Oregon, to hold and own lands within said state and transact any business in said state which it is authorized and permitted to transact by its articles of incorporation and its amended articles of incorporation.

IV.

In and by its articles of incorporation and its amended articles of incorporation, the complainant is organized for the purpose, and has power, among other things, to purchase, sell, exchange, lease, mortgage, pledge and otherwise incumber and deal in lands, water rights and water privileges and interests in lands, water rights and water privileges of every kind and nature whatsoever, situated in the State of Oregon and elsewhere, and in general to engage in and carry on the business of dealing and operating in real estate; to acquire, own, purchase, sell, incumber or othewise dispose of and enjoy water for irrigation or domestic consumption, watering live stock on dry lands and other legitimate purposes, and to use the waters of the rivers, streams and lakes in the State of Oregon and elsewhere for any and all legitimate purposes.

V.

Complainant is the owner of and is in possession of certain lands situated in the State of Oregon, particularly described as follows:

The west half of the southwest quarter of Section twenty-seven (27), the southeast quarter of Section thirty-four (34), the northwest quarter of the northeast quarter of Section thirty-four (34), the north half of the southwest quarter of Section thirty-five (35), all in Township three (3) south, Range fourteen (14) east of the Willamette Meridian; also,

Lot two (2), the same being the northwest quarter of the northeast quarter of Section three (3), the southwest quarter of the northeast quarter of Section three (3), the west half of the southeast quarter of Section three (3), the east half of the southwest quarter of Section three (3), the southeast quarter of the northwest quarter of Section three (3), the northwest quarter of Section ten (10), the northwest quarter of the southwest quarter of Section ten (10), the north half of the southwest quarter and the northwest quarter of the southeast quarter of Section nine (9), the northeast quarter of the southeast quarter of Section eight (8), all in Township four (4), Range fourteen (14) east of the Willamette Meridian; and also

The right to use so much of the banks of the Deschutes River where the same crosses or touches the northwest quarter of the southeast quarter of Section thirty-five (35) in Township three (3) south, Range fourteen

(14) east of the Willamette Meridian, as may be necessary or convenient in the development of power on the Deschutes River above or below said northwest quarter of the southeast quarter of Section 35, in Township 3 south, Range 14 east of the Willamette Meridian, and also a right of way across said northwest quarter of the southeast quarter of Section thirty-five (35), in Township three (3) south, Range fourteen (14) east of the Willamette Meridian, for pipe lines, canals and flumes on such line as the complainant may select for the same.

Complainant showeth unto your Honors that said lands lie upon both sides of the Deschutes River in the State of Oregon; that the same were purchased by complainant for the purpose of constructing and installing thereon a plant for the generation of power for manufacturing purposes and for sale, and complainant has for some time past, and prior to the committing of the acts herein complained of, been engaged in the construction of a plant for generating power upon said lands, and has expended large sums of money to this and, and at the time that the acts hereinafter complained of were committed, was actually engaged in the prosecution of said work.

VI.

Notwithstanding the rights of your orator, and its ownership of said land, the defendant, without authority from complainant, and without right, and against the protest of complainant, has entered upon the lands of complainant above described and is now engaged in the construction of a railway over and across said lands;

that said railway is so located that the construction over said lands will absolutely prevent the complainant from building a dam in the Deschutes River on its said lands to a height exceeding fifty-four feet, and thereby the power which the complainant will be able to generate by means of the waters of the Deschutes River on the lands above described will be greatly impaired and the cost of the power will be greatly enhanced and the maintenance and operation of said power plant when constructed will be greatly obstructed and imperiled.

VII.

Complainant further showeth unto your Honors that no agreement has ever been made with your Orator as to the compensation to be paid for building said railway over said lands, and that no compensation or damages have been tendered to your orator, or to any one, for the taking of or injury to its property above described, and no permission has been given by your orator, or by any one, to enter upon said lands, or to build a railroad over the same.

VIII.

Complainant further showeth unto your Honors that defendant claims that the construction of its line of railway over and across said lands is being done under license, consent and authority of the complainant and its predecessor in interest in said lands, and that said alleged license, consent and authority was given and granted pursuant to an agreement on the part of defendant to so construct its said line of railway as to

permit of the construction of a dam in the Deschutes River on the lands of complainant of a height of sixty (60) feet above the low water mark of said river. In this regard complainant showeth unto your Honors that it is informed by the agents and representatives of the predecessor in interest of your orator, with whom it is alleged said agreement was made, that no license or permission was ever given defendant to so construct its said line of railway as to permit of the construction of a dam in the Deschutes River on the lands of complainant of a height of sixty (60) feet above the low water mark of said river; and that in so far as complainant is concerned no consent, license or permission was ever given defendant to so construct its said line of railway on the lands of complainant as to permit of the construction of a dam on the Deschutes River of a height of sixty feet above the low water mark of said river. The complainant further showeth unto your Honors that notwithstanding said alleged and pretended license, agreement and consent, and wholly in disregard of the terms and conditions upon which defendant claims that same was given, the defendant has in truth and in fact so constructed and is so constructing its line of railway over and across the said lands of complainant as to permit of the erection of a dam in the Deschutes River on the lands described in the complaint herein to a height not in excess of fifty-five (55) feet above the low water mark of said river, and that the acts of defendant in so doing are in direct contravention of the terms of said alleged and pretended agreement.

IX.

Complainant further showeth unto your Honors that the defendant in constructing the railroad over the lands above described, has taken large quantities of earth and stone from the line of railway which the defendant is constructing, and has thrown the same over the banks of the Deschutes River on the work now being prosecuted by your orator, and has seriously interfered with the work of constructing and installing a power plant on said river, which your orator is now prosecuting, and threatens to, and unless restrained by your Honors, will continue to take earth and stone and cast the same upon the ground upon which your orator is engaged in constructing said power plant, and will thereby seriously hinder and delay your orator in the prosecution of its work and prevent your orator from completing its power plant until the said railway is completed, and even after said railway is completed the construction of your orator's dam and power plant will be greatly interfered with and imperiled by slides caused by the building of said railway and by the maintenance and operation of said railway; that your orator has protested against the building of said railway and particularly against the building of the said railway where the same is located over the lands of your orator, and has forbidden the entry and trespass on its lands above described for the construction of said railway, unless and until full compensation be fixed and paid to your orator, but defendant, notwithstanding, continues to enter upon and trespass on said lands, and to construct said railway over the same, and to interfere with and obstruct the

work on its said lands in which your orator is now engaged, and defendant will, unless inhibited therefrom by order of your Honors, continue to enter and trespass on your orator's said lands and build said railway over and across the same in the manner in which the defendant has hitherto entered upon said lands and constructed said railway, and interfere and hinder the work which your orator is now prosecuting on its said lands, and will impair the said power plant and greatly enhance the cost of generating and developing said power and permanently injure said lands of complainant and thereby complainant will be irremediably injured and damaged.

X.

The complainant further showeth unto your Honors that the defendant is attempting to take, use and occupy for railway purposes a strip of land about one hundred (100) feet in width along the bank of the Deschutes River as the same flows through the lands of your orator above described and other lands for station grounds, comprising altogether a tract of land of about forty-five (45) acres; that the value of said lands which the defendant is undertaking to occupy is in excess of two thousand dollars, and that the construction of a railway over and across the said lands of your orator would greatly injure and damage the other lands of your orator not sought to be taken, and would, as above stated, impair the power which your orator is able to develop by means of the flow of the waters in the Deschutes River over said lands, and that your orator will be dam-

aged in a sum far in excess of two thousand dollars if the defendant be permitted to trespass upon your orator's lands, and that the amount involved in this controversy is more than two thousand dollars, exclusive of interest and costs. And complainant further showeth unto your Honors that it has no plain, adequate or speedy remedy at law, and is unable, by reason of the circumstances above alleged, to prevent, without the assistance of a court of equity, the injuries and damages herein complained of, or to protect its property from the unlawful acts of the defendant, and must therefore seek relief in equity whereof such matters are properly cognizable and relievable.

For as much therefore as your orator is remediless in the premises at and by the strict rules of common law, and is only relievable in a court of law where matters of this kind are properly cognizable and relievable, it prays aid of this Honorable Court that a writ in injunction issue out of and under the seal of this court, or be issued by one of your Honors according to the form of the statute as in such case may be provided, commanding and enjoining, restraining and prohibiting the defendant and each and all of the servants, agents, employes, attorneys and all persons acting by and through the authority or the direction of the defendant from entering upon and from trespassing upon the lands of your orator above described, or any thereof, and from constructing or building a railroad over the same, and from interfering with the possession thereof by your orator, and from interfering with the enjoyment of said lands by your orator pending the determination of this

suit, and that upon the final hearing of this cause such injunction be made perpetual, and that your orator may have such further and other relief in the premises as the nature and circumstances of this cause may require and as to your Honors shall seem meet, and may it please your Honors to grant unto your orator a subpoena of the United States of America issued out of and under the seal of this Honorable Court directed to the defendant therein and thereby commanding the defendant for a day certain therein to be named and under a certain penalty to be and appear before this Honorable Court then and there to answer, but not under oath, an answer under oath being erpressly waived, all and singular the premises, and stand to and perform and abide by the said order and direction and decree as may be made against the defendant in the premises and as shall seem meet and agreeable to equity and to good conscience, and your orator as in duty bound will ever pray, etc.

J. N. TEAL,
WIRT MINOR,
W. A. JOHNSON,
Solicitors for the Complainant.

TEAL, MINOR & WINFREE,
Counsel for Complainant.

Verification waived.

J. G. WILSON,
of Counsel for Defendant.

Defendant offered in evidence copy of the rules adopted by the Secretary of the Interior for proceedings

in the Land Office for right of way, which was received in evidence, marked Defendant's Exhibit G-2, and accompanies this record.

Plaintiff offered in evidence the contract entered into between the defendant company and the United States, affecting the elevation of its tracks when required for the development of water power in the Deschutes Canyon, which was objected to by the defendant as immaterial and irrelevant to this controversy, and on the ground that it was made under protest with no authority of law for the execution of the stipulation. Same was received in evidence, marked Plaintiff's Exhibit 40, and is as follows:

It is hereby stipulated and agreed by the Deschutes Railroad Company, in consideration of, and as a prerequisite of its application for a right of way from a point in Section 36, township 3 south, range 14 east, W. M., to a point in section 18, township 6 south, range 14 east, W. M., as shown on map filed in The Dalles Land Office November 7, 1908; that if said application is granted and approved it, the said Deschutes Railroad Company, will change, move and elevate its tracks, roadbed and all appliances appurtenant thereto, at its own proper cost and expense, and without cost to the Government of the United States, its lessees, grantees, their successors in interest, heirs or assigns, upon ninety (90) days written notice so to do from the Secretary of the Interior, such changing, moving and elevation of its tracks, roadbed and appurtenances as aforesaid to be made to such height and distance from the approved

right of way and constructed roadbed, and in such manner as may be deemed necessary by the Secretary of the Interior, for the purpose of utilizing to the best advantage any public lands over which said right of way passes, and which may now or hereafter be withdrawn by the Secretary of the Interior, or by any other lawful authority for the conservation or use of power, power sites or power purposes. The Deschutes Railroad Company hereby consents to accept the said right of way, subject to the terms and conditions of this stipulation.

That was filed under protest, as follows:

To the Honorable Commissioner of the General Land Office, Washington, D. C.
Sir:

In compliance with requirement contained in letter of S. V. Proudfit addressed to A. A. Hoehling, Jr., dated February 8, 1910, I have the honor to hand you herewith power site stipulation executed by the Deschutes Railroad Company in connection with its pending application for railroad right of way under the provisions of the Act of Congress approved March 3, 1875, (18 Stat. 48), from a point in section 36, township 3 south, range 14 east, W. M., to a point in section 18, township 6 south, range 14 east W. M., as shown on map filed in The Dalles Land Office November 7, 1908.

In complying with said requirement, and in executing and filing the enclosed stipulation, said Deschutes Railroad Company does so under protest, not waiving, but hereby expressly reserving, its right to insist upon

the provisions of law under which said application for right of way is made, and under which the same is authorized to be granted and secured to it, which neither contemplate nor authorize the exaction nor requirement of such stipulation as a condition precedent to the formal approval of such application for railroad right of way.

Respectfully,

W. W. COTTON,
A. A. HOEHLING, JR.,
JAMES G. WILSON,
Attorneys for Deschutes Railroad Co.

That stipulation and protest was authorized by the Board of Directors of the Deschutes Railroad Company.

Plaintiff offered in evidence the record of the issuance of Patent No. 991907, covering a siphon spillway for dams, issued to George F. Stickney of Albany, New York, on application filed March 20, 1911; which was received in evidence, marked Plaintiff's Exhibit 41, and accompanies this record.

Plaintiff offered in evidence the answer of the defendant filed in this cause on the 15th day of June, 1910, to the amended bill of complaint; and same was received and marked Plaintiff's Exhibit 42 and is as follows:

In the Circuit Court of the United States for the District of Oregon.

Eastern Oregon Land Company, a corporation,
Complainant,

vs.

Deschutes Railroad Company, a corporation,
Defendant.

ANSWER TO AMENDED BILL OF COMPLAINT.

Comes now the defendant above named, and for answer to the complainant's amended bill of complaint, admits, denies and alleges as follows, to-wit:

I.

Admits the allegations contained in paragraph numbered I of said amended bill.

II.

Admits the allegations contained in paragraph numbered II of said amended bill.

III.

Defendant denies that it has any knowledge or information sufficient to form a belief as to whether or not complainant, long or at all prior to the organization of the defendant as a corporation, or to the location of defendant's line of railway across the lands claimed by complainant, filed with the secretary of state of the

State of Oregon, duly or otherwise, certified copies of its articles of incorporation, or power of attorney, whereby it appointed an agent in the State of Oregon, upon whom service of summons might be had, or paid to the State of Oregon all or any sums of money required by the laws of the State of Oregon to be paid by foreign corporations, so as to authorize such corporations to transact business in this state, or in all or any respects complied with the statutes of the State of Oregon regulating the admission of foreign corporations to do business in the State of Oregon, or has at all or any times paid all license fees and other sums required of it by the State of Oregon for such purposes, or at all, or is entitled to do business in the State of Oregon, or to hold or own land within said state, or to transact any business within said state, which it is, or claims to be authorized or permitted to transact; by its articles of incorporation or its amended articles of incorporation, and therefore denies the same and each and every part thereof.

IV.

This defendant denies that it has any knowledge or information sufficient to form a belief as to whether or not, in or by complainant's articles of incorporation, or its amended articles of incorporation, the complainant is organized for the purpose of, or has power, among other things or at all, to purchase or sell, or exchange or lease, or mortgage, or pledge, or otherwise incumber or deal in lands, or water rights, or water previleges, or interests in lands, or water rights, or water privileges,

of every or any kind or nature whatsoever, situated in the State of Oregon, or elsewhere, or in general to engage in, or carry on, the business of dealing or operating real estate, or to acquire or own, or purchase or sell, or incumber, or otherwise to dispose of, or enjoy, water for irrigation or domestic consumption, water live stock, on dry lands, or other legitimate purposes, or to use the waters of the rivers, or streams, or lakes in the State of Oregon, or elsewhere, for any and all legitimate purposes, and therefore denies the same, and each and every part thereof.

V.

This defendant denies that it has any knowledge or information sufficient to form a belief as to whether or not the complainant is the owner of the west half of the southwest quarter of Section 27, township 3 south, range 14 east, W. M., or of the northwest quarter of the northeast quarter of section 34, township 3 south, range 14 east, W. M., or of the southeast quarter of the northwest quarter of section 3, township 4 south, range 14 east, or the north half of the southwest quarter, or the northwest quarter of the southeast quarter of section 9, or of the northeast quarter of the southeast quarter of section 8, township 4 south, range 14 east, W. M., and therefore denies that said complainant is the owner, or in possession of any of said lands; and with regard thereto, this defendant alleges that the survey of the line of the Deschutes Railroad Company does not pass over any of said land above described, nor has the defendant built any roadbed or grade thereon, nor does it

intend to construct a line of railroad thereon, or to interfere with the same at all.

This defendant denies that complainant is the owner or in possession of the north half of the southwest quarter of section 35, township 3 south, range 14 east, W. M., or of lot 2, (the same being otherwise described as the northwest quarter of the northeast quarter of Section 3, township 4 south, range 14 east, W. M.), and with reference to said last described property this defendant alleges that the title thereto is in the United States, and the said United States has withdrawn said property from sale.

This defendant admits that the complainant is the owner of the southeast quarter of section 34, township 3 south, range 14 east, W. M., and also of the west half of the southeast quarter, and the east half of the southwest quarter, and the southwest quarter of the northeast quarter, of section 3, the northwest quarter, and the northwest quarter of the southwest quarter of section 10, township 4 south, range 14 east, W. M.

This defendant denies that the said complainant is the owner of, or in possession of the right to use so much of the banks of the Deschutes River, where the same crosses or adjoins the northwest quarter of the southeast quarter of section 35, township 3 south, range 14 east, W. M., as may be necessary or convenient in the development of power in the Deschutes River, above or below said northeast quarter of the southeast quarter of section 35, or is the owner or in possession of a right of way across the northwest quarter of the southeast quar-

ter of said section 35, for pipe lines or canals, or flumes, or otherwise, on such or any line as the complainant may select for the same, or at all.

This defendant admits that the lands described in the complainant's amended complaint lie on both sides of the Deschutes River in the State of Oregon, but denies that the same were purchased by the complainant for the purpose of construction or installing thereon a plant for the generation of power, for manufacturing purposes or for sale, and denies that the complainant has, for some time past, or at all, or prior to the committing of the acts alleged in complainant's amended complaint, or otherwise been engaged in the construction of a plant for the generation of power upon said land, or has been engaged at all in the construction of a plant upon said property, or has expended large or any sums of money whatever to said end, and denies that, at the time of the acts complained of by complainant in said amended complaint, or at all, complainant was actually, or at all, engaged actively in the construction of a plant for generating power on said premises.

VI.

This defendant denies that without authority from complainant, and without right, or against the protest of the complainant, defendant has entered upon the lands of complainant described in said amended complaint, but admits that the defendant has constructed its railroad roadbed over and across certain of the lands described in complainant's amended complaint, hereinafter more particularly described, but alleges that such road-

bed and grade were constructed over the lands claimed by said complainant and its predecessor in interest in said lands.

This defendant denies that the construction of said railroad over said land will prevent the complainant from building a dam in the Deschutes River, on the land described in complainant's amended complaint to a height exceeding fifty-four feet above the low water mark of the Deschutes River, but admits that the construction of said railway will prevent the complainant from building a dam on said river above the height of sixty feet above the low water mark of the Deschutes River; and denies that the power which the complainant will be able to generate by means of the waters of the Deschutes River, on the lands of the complainant described in complainant's amended complaint, will be greatly or at all impaired, or that the cost of power will be greatly or at all enhanced, or that the maintenance or operation of any or all power plants will be greatly or at all obstructed or imperiled.

VII.

This defendant denies that no agreement has been made with complainant as to compensation to be paid for the construction of the railway over the lands claimed by the complainant described in the amended complaint.

This defendant denies that no compensation or damages have been tendered to the complainant, or to any one, for the taking of, or injury to, the property described in said amended complaint, and denies that no

permission has been given by the said complainant, or by any one, to enter upon said lands, or to build a railroad over the same.

VIII.

This defendant denies that it has any knowledge or information, sufficient to form a belief, as to whether or not complainant is informed by the agents or representatives of the predecessor in interest of said complainant, that no license or permission was ever given to so construct the defendant's line of railway as to permit of the construction of a dam in the Deschutes River on the lands of the complainant to a height of sixty feet above low water mark of said river, and therefore denies the same, and this defendant denies that no license or permission was ever given to said defendant to so construct its line of railroad as to permit of the construction of a dam in the Deschutes River on the lands of complainant of a height of sixty feet above low water mark, and alleges that such license and permit was given to the defendant by the predecessor in interest of the Eastern Oregon Land Company to so construct its line as to permit of the construction of a dam at the dam site known as the "Interior Development Company's dam site," in lot 2, section 3, township 4 south, range 14 east, W. M., as hereinafter more particularly alleged, and this defendant denies that no consent or license, or permission was ever given by the complainant to the defendant to so construct its line of railway on the lands claimed by the complainant, as to permit of the construction of a dam in the Deschutes River of a height

of sixty feet above low water mark of said river, and this defendant alleges that permission was given by the said Eastern Oregon Land Company, complainant herein, to the defendant, to so construct its line as to permit of the construction of a dam at the site known as the dam site of the Interior Development Company of sixty feet in height above the low water mark of the Deschutes River.

This defendant denies that the line of railway of the defendant over and across the said lands of complainant, is being so constructed as to permit of the erection of a dam on the said site above referred to, to a height not in excess of fifty-five feet above low water mark of said river, or that the said defendant is in any way violating its said agreement or consent, but alleges that its said line is being constructed in all respects in accordance with the said agreement and consent, and so as to permit of the construction, at the said dam site, of a dam to the height of sixty feet above the low water mark of the said Deschutes River.

IX

This defendant denies that in constructing its railroad over the lands described in said amended complaint, it has taken large, or any, quantities of earth or stone from the line of the railway which it is constructing, or has thrown the same, or any thereof, over the banks of the Deschutes River, on the work being prosecuted by the complaint, or elsewhere, or has seriously or at all, interferred with the work of constructing or installing of a power plant on said river; and denies that

the said complainant is or has been constructing or installing a power plant on said river, and denies that the defendant is threatening to, and unless restrained, will continue to take earth or stone, or cast the same upon the ground upon which the complainant alleges it is engaged in constructing a power plant, or will thereby, or at all seriously hinder or delay complainant in the prosecution of the work which it alleges it is carrying on, or prevent the complainant from completing the power plant which it alleges it is constructing, and denies that even after said railway is completed, or at all, the construction of the complainant's power plant, which it alleges it is constructing, will be greatly or at all interfered with or imperilled by slides, or any other trouble caused by the building of the said railway, or by the maintenance or operation of said railway.

This defendant denies that the complainant has protested against the building of said railroad, or particularly or at all against the building of said railway where the same is located over the lands claimed by the said complainant in said amended complaint, or has forbidden the entry or trespass on the lands claimed by complainant described in said amended complaint, for the construction of said railway, or otherwise or at all, unless, or until compensation be fixed or paid, or at all; but admits that this defendant continues to enter upon the lands described in the amended complaint, over which it has constructed its roadbed, but denies that the same is a trespass or a violation of the rights of the complainant; but denies that the roadbed or work of the defendant interferes with or obstructs any work

which the complaint alleges it is prosecuting, or engaged in, on the lands described in the amended complaint; but admits that the defendant will continue to enter upon said lands described in complainant's amended complaint, on which its roadbed is constructed, and to construct its railroad over and across the same, in the same manner in which the said defendant has heretofore entered upon said lands, but denies that the said entry on said lands is a trespass, or otherwise than rightful, as hereinafter more particularly set forth, and denies that said entry upon said lands by the defendant will interfere or hinder the work which the said complainant alleges it is now prosecuting on said land, or will impair the said power plant, or will greatly or at all enhance the cost of generating or developing said power, or will permanently or at all injure said lands which the complainant claims, and denies that complainant will be irremediably or at all injured or damaged, and thereunto this defendant alleges that said complainant is prosecuting no work, and constructing no plant, in good faith, upon any of the lands described in complainant's amended complaint, but this defendant admits that two men have, at short periods of time, been employed on a dam site known as the Interior Development dam site, in lot 2, section 3, township 4 south, range 14 east, W. M., but that said persons so employed are not constructing a dam or power plant in good faith, but that their work is only colorable and for the purpose of making a pretense of constructing a dam and power plant; that said persons, while so employed periodically, and for only short spaces or time, have no tools with which to construct a dam or power plant, and have only a wheel-

barrow, and prosecute the work dumping a few rocks into the river only when there are other persons present; that said work consists only of dumping loose rock into the Deschutes River; that no cement is used for the purpose of making a proper dam, or a dam which will resist the force of the Deschutes River, and work so being done is simply a colorable attempt to retain the right to construct a dam and appropriate the waters of the Deschutes River under an appropriation notice posted and filed under the act of the legislature of the State of Oregon in effect prior to the water code adopted by the legislature of the State of Oregon at its session in 1909; that complainant has acquired no right to construct a dam or appropriate the waters of the Deschutes River at the point where said persons are engaged at work.

This defendant admits that it is using for railroad purposes, a strip of land one hundred feet in width along the bank of the Deschutes River, where the same runs through the lands claimed by the complainant, including those to which said complainant has no title, but denies that the value of the land so used and occupied is $2,000.00, or exceeds the value of $1,000.00, together with any damage to adjacent lands belonging to, or claimed by complainant, and denies that the construction of the railway across said lands claimed by the complainant would greatly or at all injure or damage other lands of complainant, or would impair the power which the complainant is able to develop by means of the flow of water in the Deschutes River over said lands, and denies that said complainant will be damaged in a sum in ex-

cess of two thousand dollars, or in any sum in excess of one thousand dollars; and denies that the amount involved in this controversy is more than two thousand dollars, exclusive of interest or costs, or exceeds the sum of one thousand dollars; and denies that complainant has no plain, speedy or adequate remedy at law; and denies that defendant is committing any injuries or damages cognizable in a court of equity or remediable by a court of equity, and denies that defendant is committing any unlawful acts upon the property of the complainant, and denies that the complainant must, or can, seek relief in equity for the acts complained of.

For a further and separate defense to complainant's amended complaint, this defendant alleges:

I

That defendant is a corporation, duly organized and existing under and by virtue of the laws of the State of Oregon, having its principal office and place of business in the city of Portland in said State of Oregon; that it has power, under its articles of incorporation, to acquire or construct and equip a line of railroad and telegraph from a point of connection with the constructed line of railroad of The Oregon Railroad & Navigation Company, at or near Deschutes station in the State of Oregon, and thence by some eligible route to be selected by the board of directors of the company, via the valley of the Deschutes River, to a point at or near Bend, in the State of Oregon; that said Deschutes Railroad Company is organized as a common carrier of freight and pas-

sengers, and has power to condemn land along the survey of this route and line of definite location for the purpose of construction of its line of railroad; that said company is a public service corporation; that pursuant to said corporate power, the said Deschutes Railroad Company caused a survey of its line to be made between the termini above named; that said survey was staked out upon the ground, and at a meeting of the board of directors of said railroad company, duly called and held at the office of said company, in Portland, Oregon, on the 5th day of November, 1908, said board adopted said survey as the line of definite location of the said Deschutes Railroad Company's line of railroad; that said line of railroad, so adopted passes over the following described lands, described in complainant's amended bill, to-wit:

The southeast quarter (SE ¼) of section thirty-four (34); the north half (N½) of the southwest quarter (SW ¼) of Section thirty-five (35), both in township three (3) south of Range fourteen (14) east of the Willamette Meridian; lot two (2) of section three (3), same being the northwest quarter (NW ¼) of the northeast quarter (NE ¼) of section three (3); the southwest quarter (SW ¼) of the northeast quarter (NE ¼); the northwest quarter (NW ¼) of the northeast quarter (NE ¼), and the east half (E½) of the southwest quarter (SW ¼) of section three (3); the northwest quarter (NW ¼), and the northwest quarter (NW ¼) of the southwest quarter (SW ¼) of section ten (10), township four (4) south of range fourteen (14) east of the Willamette Meridian.

II

That the title to the north half of the southwest quarter of section 35, township 3 south, range 14 east, W. M., and lot 2, section 3, township 4 south, range 14 east, W. M., is still in the United States of America, and has never been obtained, and is now withdrawn from sale or disposal by the said United States; that said last named property has, for some time, been in controversy in the United States land office, between the Santa Fe Pacific Railroad Company and J. H. Sherar, now deceased, and the heirs and devisees of said J. H. Sherar since the decease of said Sherar; that the said Santa Fe Pacific Railroad Company has sold and transferred to the Interior Development Company all of its right and title to said property, which said transfer was made in the year 1906; that prior to the entering upon the said lands above described, over which the survey of the line of the Deschutes Railroad Company runs, said railroad company secured a license and permit to go upon said land from the heirs and devisees of J. H. Sherar, deceased, and the executors of the will of said J. H. Sherar, deceased, and also from the holders of the option to purchase said lands from the said J. H. Sherar, and from the Eastern Oregon Land Company, who subsequently purchased said property from J. H. Sherar, and from the Interior Development Company; that all of said persons and corporations interested in said land, in consideration of the benefits to be derived by the adjoining lands owned or claimed by said persons or corporations, consented and agreed that the said Deschutes Railroad Company should have the right to immediately enter

upon the said lands, owned or claimed by them above described, over which the survey of the Deschutes Railroad Company ran, and construct its railroad thereover; that it was further agreed that in case the option given by J. H. Sherar on the said lands owned and claimed by the said Sherar, should not be exercised, then the said heirs and devisees of said J. H. Sherar would make, execute and deliver a deed to the Deschutes Railroad Company for said property which the line of the said Deschutes Railroad Company should run, and that the Deschutes Railroad Company should pay for the said right of way so conveyed the sum of one thousand dollars, in addition to the benefits to be derived by the construction of said road, and that it was agreed with the Eastern Oregon Land Company that, in case the said Eastern Oregon Land Company should purchase said property, the said one thousand dollars should be paid to the said Eastern Oregon Land Company, upon the execution and delivery of a deed for the said right of way; that it was agreed by and between the Deschutes Railroad Company and all of the persons interested, or claiming to be interested in said lands, that the line of the Deschutes Railroad Company, where the same passes the dam site known as the dam site of the Interior Development Company, in lot 2 of section 3, township 4 south of range 14 east of the W. M., should be constructed at an elevation of sixty (60) feet above the low water mark of the Deschutes River at said point; that in pursuance of said understanding and agreement, and said license to immediately enter upon said lands and construct its line thereover, the said Deschutes Railroad Company did enter upon said lands in the early part of September,

1909, and has diligently and constantly prosecuted the work of constructing its roadbed and grade over the same, at all times since, and that the said roadbed, with the exception of one or two small places of not to exceed a few rods, is entirely completed, and has been so completed for a period of approximately two months.

III

That the said roadbed of the defendant, as so constructed, in pursuance to said understanding, is at an elevation in excess of sixty (60) feet above the low water mark of the Deschutes River at the point known as the dam site of the Interior Development Company, in lot 2 of section three, township 4 south of range 14 east of the W. M.; that said Deschutes Railroad Company in pursuance of said consent and understanding entered upon the said lands and expended large sums of money in the construction of its roadbed through the said lands, and above and below said lands at the grade of the said line of the Deschutes Railroad Company; that the grade of the said line of the Deschutes Railroad Company, above and below said lines, is constructed in conformity with said grade where the same runs through the said lands, and the said Deschutes Railroad Company has expended, in the construction thereof, a sum of money in excess of Thirty Thousand ($30,000.00) Dollars per mile; and that in raising said grade to the elevation in excess of sixty (60) feet in lot 2 of section 3, aforesaid, the said Deschutes Railroad Company has expended in excess of one hundred thousand ($100,000.00) dollars over and above what it would have been

obliged to expend in the construction of its line on the water level grade through said property; that during all of said times, while the said roadbed was being constructed through the said property, said Eastern Oregon Land Company made no objection whatever to the construction of the same, or the manner in which same was being constructed, through said land, and acquiesced in the construction of said line at the said height, and made no objection whatever until after the construction of said roadbed through said lands had been practically completed; that the said entry of the Deschutes Railroad Company upon said lands, and the construction of its roadbed and grade over the same was made under the said license and permit, and rightfully, that the said Deschutes Railroad Company relied upon said permit, license and authority, and spent large sums of money in reliance upon the same; and that at all times since the first of September, 1909, the said Eastern Oregon Land Company has had notice and knowledge of the construction of said line over said lands, and of the manner in which, and the height at which the same was being constructed; that the entry of the said defendant upon said lands and the construction of its line thereover was made prior to the acquisition of title to the same, or any part thereof, by the Eastern Oregon Land Company, and the said Eastern Oregon Land Company purchased said lands, and acquired title to this portion thereof to which it has obtained title, with full knowledge of all the facts, and of the construction of said line across the same, and has never objected to this defendant's title on account of the construction of said line or the manner in which, or the height at which said line was being con-

structed, until after the completion of the construction of said roadbed.

Further answering the amended bill of complaint herein, this defendant alleges that the line of railroad of the said Deschutes Railroad Company is being constructed for the benefit of the public, and for the public use; and where the same runs across the lands hereinbefore described; is a part of an entire line of railroad from the point of connection with the line of the O. R. & N. Co. at the Deschutes Station to Bend, and the grade of the line where the same runs over the lands hereinabove described and claimed by the complainant, is made to conform to and connect with the balance of the line of this defendant, and as a part of the entire line; and that the work of construction of said line through the said lands has been prosecuted continually and diligently at all times since the first of September, 1909, and that at all times while the work of construction has been prosecuted, all persons, including the Eastern Oregon Land Company, have had every notice of the prosecution of said work and the manner in which the roadbed of said road was being constructed; that the entry upon said land and the construction and the work thereon was with the consent of all persons having or claiming any interest in the said lands, and that all persons, including the Eastern Oregon Land Company, have acquiesced in the said work of construction, and the expenditure of large sums of money by the defendant in the construction of said line, and have so acquiesced at all times until after the roadbed through the same was completed; that at the time of the entry upon said lands, and of the con-

struction of the said roadbed, the said Eastern Oregon Land Company had no title to said lands, or any thereof, but that since the construction of said line, the said Eastern Oregon Land Company has acquired by purchase, title to the following lands over which said line is constructed, to-wit: the southeast quarter of section 34, township 3 south of range 14 east of the W. M.; the southwest quarter of the northeast quarter of section 3; the west half of the southeast quarter of section 3; the east half of the southwest quarter of section 3; the northwest quarter of section 10, and the northwest quarter of the southwest quarter of section 10; all in township 4 south of range 14 east of W. M., and in addition, claim to have acquired an interest in the north half of the southwest quarter of section 35, township 3 south of range 14 east of W. M., and lot 2 of section 3, township 4 south, of range 14 east of W. M., but that the title to the above named property is in the United States of America, and the same was, on the 26th day of October, 1908, withdrawn from sale or disposition in any manner by the United States, and has at all times remained withdrawn from sale, and not subject to sale or disposition in any manner; that the said complainant has waived its right to enjoin the construction of said line or the use thereof by the defendant for its railroad, and has waived its right to any injunctive relief at the hands of a court of equity.

IV

That the defendant is a solvent corporation, and has expended approximately two million dollars in the con-

struction of its line of railroad, and has property far in excess of any damages which might be recovered against it by the said complainant, and is able to pay any judgment that may be recovered by the complainant; that the grade of this defendant over the lands in question has been practically completed for approximately two months, and the injury, if any, to the complainant, can be adequately compensated in damages, and if the injunction should be granted, as prayed for by the complainant, it will greatly impede and interfere with the completion of the work of the railroad line of the defendant, and will result in great and irreparable injury to this defendant, and this complainant should be denied any injunctive relief; that this defendant is able, ready and willing to pay to the complainant the sum of one thousand ($1,000.00) dollars for the land occupied by it for right of way through the lands in question, and hereby offers to pay said sum of one thousand dollars to said complainant upon the execution and delivery to it of a good and sufficient deed to the said right of way through said lands.

V

Further answering said amended bill of complaint, this defendant alleges that complainant has no power or authority under its articles of incorporation to acquire property for public use or by means of eminent domain, for the purpose of constructing a dam along said Deschutes River on the land in question, or for the purpose of over-flowing the lands above said proposed dam, on account of the back water which will be created by said

dam; that the Deschutes Railroad Company has acquired by purchase, and is the absolute owner in fee above the location of the said dam which said Eastern Oregon Land Company pretends to be constructing, and along the Deschutes River, and that said lands, so owned by the Deschutes Railroad Company, will be overflowed and damaged by the waters of the Deschutes River in case the same is constructed at all on the lands claimed to be owned by said complainant; that the said lands so owned by said defendant are strips of land one hundred feet in width along the center line of the survey of said company's line, through the following property, to-wit: the southeast quarter of the southwest quarter of section 9; the northeast quarter of the southeast quarter of section 17; the west half of the southwest quarter of section 16; the west half of the northwest quarter of section 21; the northeast quarter of the northeast quarter of section 20; the northeast quarter of the southeast quarter of section 20; the southwest quarter of the northeast quarter of section 32; all in township 4 south of range 14 east of W. M.; that the complainant has acquired no right to flow said waters of the Deschutes River back upon the lands of this defendant, and has acquired no right, and can acquire no right to raise the flow of the Deschutes River back upon the lands of this defendant, or to raise the waters of said Deschutes River above the natural flow of said river, except with the consent of the defendant; that the property so acquired and owned by the defendant was acquired for, and is held and being used for the purpose of constructing its line of railroad, and as a part of its railroad; that the line of survey and location of this company's railroad was made

and adopted by the said Deschutes Railroad Company for railroad purposes and for public uses prior to any steps taken by the complainant to appropriate the waters of the Deschutes River for power purposes, or to acquire rights for such purposes; that the dedication of the said line of railroad, and property along the survey of the line of the Deschutes to public purposes was made by said Deschutes Railroad Company prior to any right in the complainant over said property, for the development of power, or for power purposes; and the said complainant has no right or power to construct a dam or develop power along the Deschutes River at the point in question which will in any way interfere with the survey or location of the line of railroad of the Deschutes Railroad Company through said property.

Now, said defendant, denying that it has in any manner violated or infringed the right in any manner alleged in the amended complaint, and denying that this complainant has any right to further answer to the amended bill of complaint herein, and denying that the complaint is entitled to any injunction or other relief whatever, without this, that any other matter, cause or thing in said complainant's said amended bill contained material or necessary to make answer unto, and not hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, to the knowledge or belief of the defendant, submits for the reasons hereinbefore recited and set forth, that the complainant is not entitled to any relief whatsoever against this defendant, all of which matters and things the defendant is ready and willing to aver, maintain and prove, as this Honor-

able Court shall direct, and therefore, prays to be hence dismissed with its reasonable costs and charges in its behalf most wrongfully sustained.

W. W. COTTON,
JAMES G. WILSON,
Solicitors for Defendant.

United States of America,
State and District of Oregon.—ss.

On this 15th day of June, A. D. 1910, at Portland, Oregon, in the county of Multnomah, before me personally appeared J. P. O'Brien, who, being first duly sworn, deposes and says, that he is the president of the Deschutes Railroad Company, the defendant above named; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except on matters therein stated on information and belief, and as to those matters, he believes them to be true.

J. P. O'BRIEN.

Subscribed and sworn to before me, this 15th day of June, 1910.

JAMES G. WILSON,
(Seal) Notary Public for Oregon.

State of Oregon,
Multnomah County.—ss.

I, James G. Wilson, one of the solicitors for the defendant in the above entitled cause, do hereby certify that I have compared the foregoing copy of answer to

amended bill with the original thereof, and that the same is a full, true and correct copy of such original, and of the whole thereof.

JAMES G. WILSON,
Solicitor for Defendant.

In the District Court of the United States for the District of Oregon.

Eastern Oregon Land Company, a corporation,

Complainant,

vs.

Deschutes Railroad Company, a corporation,

Defendant.

CERTIFICATE TO EVIDENCE.

This is to certify that the appellant and the cross-appellant have prepared a statement of evidence and duly lodged the same in the office of the Clerk of this Court; and have lodged therewith a stipulation providing that the said stipulation, together with the narrative form statement of the testimony to which it is attached, and the exhibits, of which copies are included therein, or attached thereto, to be printed therewith, to-wit: Plaintiff's Exhibits 1, 9, 19, 24, 25, 29, 30, 40, 42, and Defendant's Exhibits B, Q, E-2 and F-2, which it is stipulated are the only ones that need to be printed in the record; and the following additional exhibits referred to in said transcript of testimony, which it is stipulated need not be printed, but shall be identified and the orig-

inals thereof set up with the record, shall constitute all the evidence in the cause for the purpose of the appeal herein, now pending; and the said original exhibits or in cases where copies were substituted, the copies thereof, to be sent up with the record but not to be printed under the stipulation of the parties, being the following, to-wit: Plaintiff's Exhibits 2, 3, 4, 5, 20, 21, 22, 23, 31, 32, 33, 34, 38, 39, 41, Whistler's Exhibits 1, 2 and 3, and Defendant's Exhibits A, C, Ca, R, S, T, U, V, W, X, Y, Z, A-2, B-2, C-2, G-2, 1, 8 to 34, 42 and 43 and 44.

And it appearing and being founded by consent of both parties that the statement of the evidence is true, complete and properly prepared:

It is now, therefore, by the court found, ordered and certified that the annexed statement of the evidence attached hereto, including the stipulation of the parties forming a part thereof, and the exhibits therewith included and referred to in said stipulation be, and the same is hereby made a part of the record in this cause as the statement of the evidence therein, and the same shall constitute a part of the record in said cause for the purpose of appeal.

Dated at Portland, Oregon, this 29th day of March, 1916.

R. S. BEAN,
United States District Judge for the District of Oregon.

Filed March 29, 1916.

G. H. Marsh, Clerk.

And afterwards, to-wit, on the 29th day of March, 1916, there was duly filed in said Court, Praecipe for Transcript, in words and figures as follows, to-wit:

In the District Court of the United States for the District of Oregon.

Eastern Oregon Land Company, a corporation,

Complainant,

vs.

Deschutes Railroad Company, a corporation,

Defendant.

To the Clerk of the above entitled Court:

PRAECIPE FOR TRANSCRIPT.

You will please prepare and certify, to constitute the record on appeal in the above case, the transcript of the following, omitting endorsements, acceptances of services, etc.; the record to be printed in San Francisco, California:

1. Praecipe.
2. The second amended bill of complaint and answer to same.
3. Judge's decision.
4. Final decree.
5. Petition of Eastern Oregon Land Company for appeal and order allowing same.
6. Bond of Eastern Oregon Land Company on appeal.
7. The plaintiff's assignments of errors.

8. Citation on appeal.

9. Petition of Deschutes Railroad Company for appeal and order allowing same.

10. Bond on appeal.

11. Citation of Deschutes Railroad Company on appeal.

12. Stipulation of the parties and transcript of the evidence thereto affixed, with order of court settling same.

13. Motion for modification as to costs and order on same.

VEAZIE, McCOURT & VEAZIE,
Solicitors for Appellant.

JAMES G. WILSON,
Solicitor for Defendant and Cross-Appellant.

Filed March 29, 1916.

G. H. Marsh, Clerk.

UNITED STATES OF AMERICA,)
)ss.
District of Oregon.)

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on appeal in the case in which the Eastern Oregon Land Company is plaintiff and appellant, and the Deschutes Railroad Company is defendant and respondent, in accordance with the law and the rules of Court, and in accordance with the praecipe of said appellant, filed in said cause, and that the said transcript is a full, true and correct transcript, in accordance with the said praecipe, of the said record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody.

And, I further certify that cost of foregoing transcript of record is $..... for printing said record, and that the same has been paid by said appellant, the Eastern Oregon Land Company.

In testimony whereof, I have hereunto set my hand and affixed the seal of this Court at Portland, Oregon this.....day of.....A. D. 1916.

.....

No. 2814

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

EASTERN OREGON LAND COMPANY,
a Corporation,
Appellant,

vs.

DESCHUTES RAILROAD COMPANY,
a Corporation,
Appellee.

DESCHUTES RAILROAD COMPANY,
a Corporation,
Appellant,

vs.

EASTERN OREGON LAND COMPANY,
a Corporation,
Appellee.

Appellant's Brief.

VEAZIE, McCOURT & VEAZIE,
CHARLES S. WHEELER and
JOHN F. BOWIE,
Solicitors for Appellant.

JOHN F. BOWIE,
Counsel.

Filed this.....day of October, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

The James H. Barry Co.,
San Francisco

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STATEMENT OF FACTS.

ARGUMENT.

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ARGUMENT.

PART I.

PART II.

PART III.

SYLLABUS OF ARGUMENT.

Sherar Properties.

(a) *The Bridge Property.*

Defendant did not acquire a right-of-way over the Sherar Bridge property under the Act of March 3, 1875, for the following reasons:

1. This property was embraced in a lieu selection made two years before the map of location was filed, and patents have issued to the selector. The rights of the selector were prior to the rights acquired by the railroad company under the Act of March 3, 1875 (*Daniels* v. *Wagner*, 237 U. S., 547).

2. At the time the map of definite location was filed, these lands were not subject to the operation of the Act of March 3, 1875, as the lands had been theretofore withdrawn for the purpose of establishing irrigation works thereon under the Act of June 17, 1902.

3. Even if the railroad company had acquired a right-of-way through filing its map of definite location, it abandoned all rights acquired thereby on entering upon this tract of land and other land in the possession of the plaintiff under a license covering the tract as a whole. It cannot claim under the license in part and repudiate the license in part.

(b) *Sherar Properties Other Than the Bridge Properties.*

1. The right of the railroad upon the Sherar properties is dependent upon and measured by the license under which

the railroad entered. By the terms of this license, the railroad company undertook to construct the road in such manner that a dam sixty feet high might be maintained on the land by the owners of the land. Under such agreement, the obligation to see that the road was so located as to permit the maintenance of such dam rested on the railroad company (*Unangst's Appeal*, 55 Pa. St., 128), and the rights of the railroad company under the license are subject and subordinate to the right of the land company to erect and maintain the dam.

2. The unexecuted parol agreement between Laughlin and the railroad company was not binding on plaintiff, whatever its terms may have been. Plaintiff acquired the Laughlin interest before any steps were taken in execution of the alleged agreement, and it is admitted that the railroad company had knowledge of the transfer and did no act in execution of the Laughlin agreement; it is also admitted that plaintiff purchased without knowledge of the Laughlin agreement.

3. The plaintiff is not estopped from objecting to the line of the railroad as actually located. The obligation to locate the line correctly rested upon the railroad company—not upon plaintiff. The means and knowledge of the railroad company were equal to, if not greater than, the means and knowledge of plaintiff, and the railroad company did no act in reliance on any representation of plaintiff, nor did plaintiff make any representation to the railroad company or negligently induce it to alter its position to its prejudice.

(c) *Interior Development Company Properties.*

Whatever rights may exist in favor of the railroad over the properties of the Interior Development Company, these rights cannot be asserted by the railroad for the purpose of defeating the obligations which it assumed in relation to the Sherar lands.

(d) *Equitable Condemnation Should Not Be Decreed.*

A railroad company entering upon real property under an agreement to construct its road in such manner as not to interfere with the development of water-power must perform the condition under which it entered, and equitable condemnation will not be decreed unless public convenience so requires. Under such circumstances, the road will be compelled to conform to the terms of the contract (*Unangst's Appeal,* 55 Pa. St., 128).

(e) *Damages.*

If in this case equitable condemnation is to be decreed, plaintiff is entitled to compensation for the injury done to its property as a whole, as well as to compensation for property actually taken.

No.....

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

EASTERN OREGON LAND COMPANY,
a Corporation,
Appellant,

vs.

DESCHUTES RAILROAD COMPANY,
a Corporation,
Appellee.

DESCHUTES RAILROAD COMPANY,
a Corporation,
Appellant,

vs.

EASTERN OREGON LAND COMPANY,
a Corporation,
Appellee.

STATEMENT OF FACTS.

HISTORY OF LAND TITLES.

From the year 1871 and until the time of his death, J. H. Sherar was in possession of certain land situated in the Cañon of the Deschutes River. The land is delineated in red on the following map:

Lands patented prior to 1906.

As early as 1882 the SE¼ of Section 34, Township 3 South, Range 14 East, of Willamette Meridian, was patented to Sherar by the United States, while prior to January 27, 1906, patents were issued to him conveying the fee to all the other parcels except those three parcels designated on the accompanying map by the letter "C," of which one is situated in Township 3, Section 35, and two in Township 4, Section 3. Sherar believed he had acquired title to these lands, but in this he was in error.

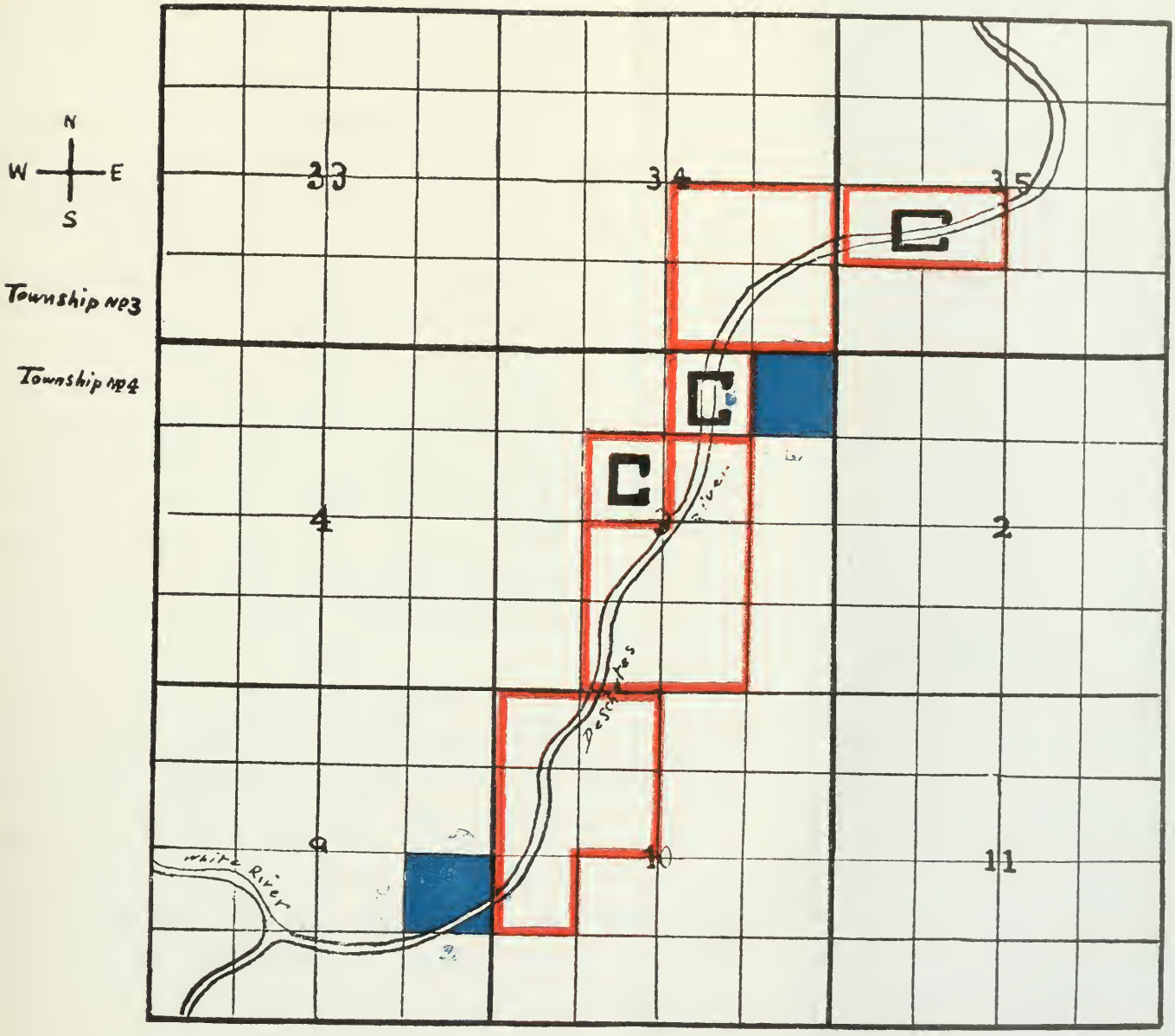
Lands for which patents did not issue till 1913.

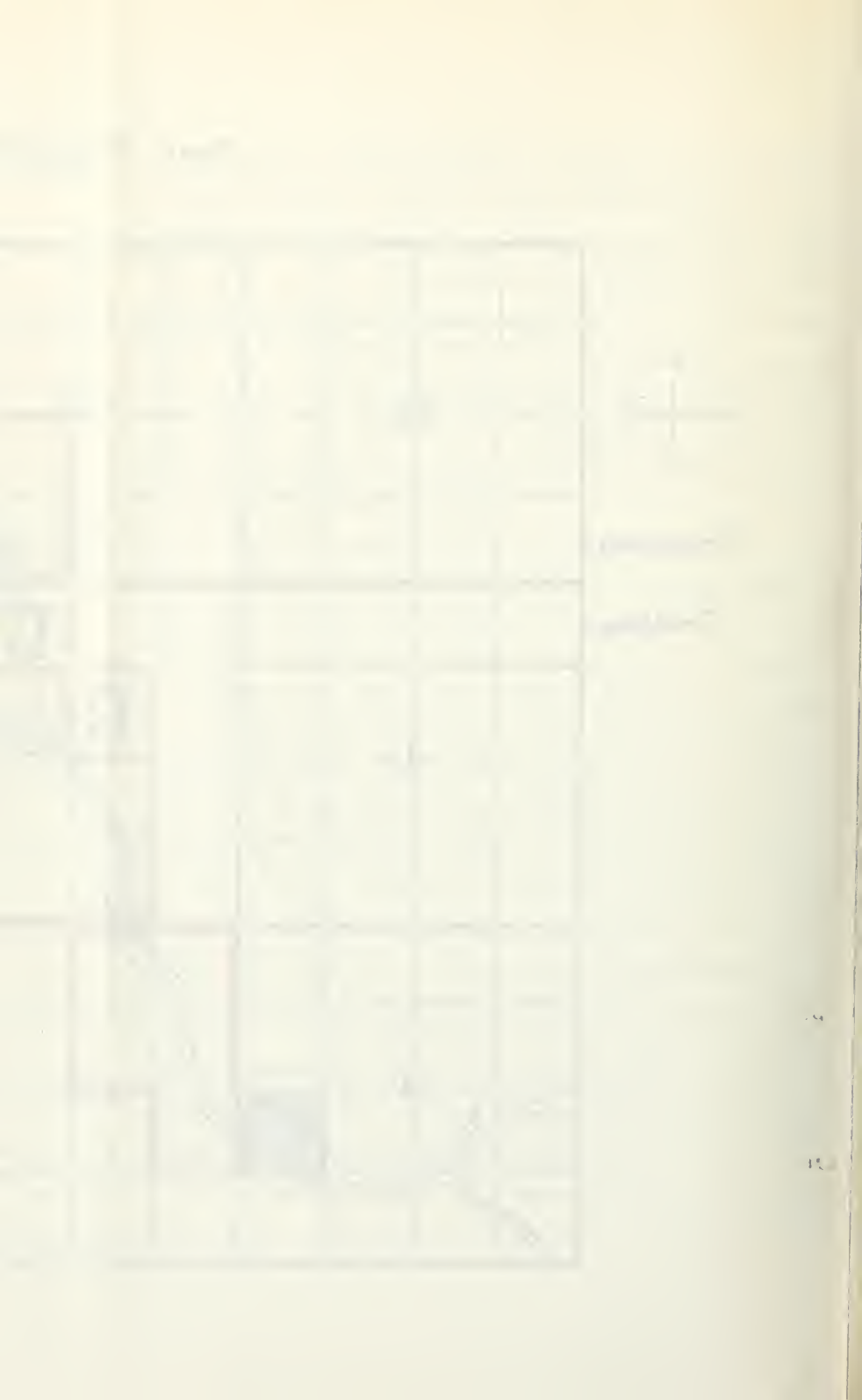
In January, 1906, the Interior Development Company, having theretofore negotiated to acquire title to all these parcels by purchase from Sherar, filed its selections covering these three properties. Promptly on discovering these facts, Sherar filed his selection and contested the selections of the Interior Development Company. This contest dragged its way through the Land Department and was finally decided in favor of Sherar on June 16, 1909. A copy of the opinion of Mr. Pierce, then First Assistant Secretary of the Department of the Interior, is contained in the Transcript (pp. 612-622). The opinion demonstrates quite clearly that all three parcels had been in the bona fide occupancy and possession of Sherar from 1871; that his occupancy thereof had been recognized in the community in which he lived, and that the land was not vacant public land of the United States.

Contest between Sherar and the Interior Development Company.

Sherar's application for patent to this land under

Range No 14 E. W.M.





lieu selection necessarily awaited the conclusion of the contest, which lasted until June, 1909. Withdrawal orders.

While this contest was pending, certain withdrawal orders were made: one dated April 26, 1906, withdrawing all tracts of land situate in Township 3, except any tracts title to which had passed out of the United States, and a similar order dated October 24, 1908, and embracing the lands in Township 4, the lands in each instance being temporarily withdrawn for irrigation works pursuant to the Act of June 17, 1902. On December 30, 1909, and March 18, 1910, these lands were embraced in another withdrawal order, and it was stated that the same were withdrawn in aid of proposed legislation affecting the disposal of power sites on the public domain. On July 2, 1910, the withdrawals of March and December were confirmed under the Act of June 25, 1910 (36 Stat., 847), but on February 25, 1913, the rights of Sherar were finally recognized, the withdrawal canceled, and patents issued to the assigns of Sherar. Cancellation of withdrawal orders and issuance of patent.

On January 27, 1906, Sherar gave an option on all of the property above mentioned to Hostetler. This option was assigned by Hostetler to Laughlin on April 14, 1909, and by Laughlin to the Eastern Oregon Land Company on August 5, 1909; and on December 4, 1909, the option was exercised by the Eastern Oregon Land Company. Full payment was made on March 30, 1910, and title transferred to that corporation. Option to Hostetler. Assignments of options. Deed to plaintiff.

THE POWER PROJECT.

Early appreciation of power possibilities.

As early as 1906 it was known that the principal value of the lands involved in this controversy arose from their availability for use as a power site. It seems, however, to have been considered by all persons interested in the project prior to 1910, that the erection of a 60 foot dam was all that was needed to develop the existing water power to the best advantage.

Purchase by Land Company.

In the year 1909 the Eastern Oregon Land Company became interested in the development of hydro-electric power in the Deschutes Cañon, and on August 5, 1909, that corporation acquired from Laughlin the option on the Sherar property, paying therefor $23,000 cash and undertaking to pay the further sum of $27,000. In December of the same year it acquired the adjacent properties of the Interior Development Company for $20,000 (see map—parcels colored blue). At this time the option on the Sherar properties was exercised and the first payment on account of the purchase price of $45,000 made.

Report of White & Co.

The Eastern Oregon Land Company employed Messrs. J. G. White & Company to make a report upon the proper development of the properties. The first, or preliminary report of White & Company was not made until the 3rd day of March, 1910. From this report it was made apparent that the construction of a dam of 100 feet in height was best suited to the full development of the property as a source of hydro-

Report of White & Co. (Continued.)

electric power and was therefore desirable. But the possibility of erecting a dam 100 feet high has been lost, as an agreement has been made granting to the Oregon Trunk Line the right to construct its road through the land, provided the road was constructed so as not to interfere with the maintenance of a 60 foot dam. This road was constructed at an elevation of between 70 and 71 feet above the low water level, as this height is essential to the maintenance of a 60 foot dam without interference with the operation of the road in time of high water (Tr., p. 393, *et seq.*).

Efficiency of a 60 foot dam.

A 60 foot dam would, according to estimates, furnish power sufficient to develop about 46,000 theoretical horsepower. The estimated capital investment required to develop and distribute the power to Portland and adjoining cities was $4,000,000, and the estimated power actually available for distribution was 40,500 horsepower (Tr., p. 269). Up to the present time $190,000 has been invested, a sum not included in the above estimate.

The value of the power site, and the result of the defendant's acts.

This project has, however, been seriously hampered by the construction of the road of the defendant company at a point where the maintenance of a 60 foot dam will result in the flooding of the road in time of high water. According to the testimony of G. A. Kyle, who was Chief Engineer of the Oregon Trunk Line and constructed the road of that company through the Deschutes Cañon, the value of the land in question has been depreciated $75,000 by the con-

The value of the power site, and the result of the defendant's acts. (Continued.)

struction of the defendant's road at the point at which it is built (Tr., p. 99). Estimates of damage done the project as a whole are much greater.

The power site is the best existing within the zone in which power can be developed and transmitted to Portland. See testimony of Mr. Kyle (Tr., p. 300). Even the defendant's witnesses declare that the site in question affords the best means for the largest and most economical development of power in Oregon. See testimony of Mr. Kelley (Tr., p. 467). Dillman and Thompson value the undeveloped land at $500,000.00, on account of the fact that power may be produced so cheaply (Tr., pp. 252 and 282).

THE RAILROAD PROJECTS.

The construction of a railroad along the line of the Deschutes River had been under consideration by both the Harriman and Hill roads for a number of years. In February, 1906, the Deschutes Railroad Company filed with the Secretary of the Interior a certified copy of its articles and a declaration of its intention to avail itself of the benefit of the Act of March 3, 1875, and acquire rights of way over the public lands pursuant to that Act. On November 5, 1908, the Railroad Company adopted a resolution defining its location, and on November 8, 1908, filed its profile with the Registrar of the United States Land Office. This map was subsequently approved on June 20, 1910.

NEGOTIATIONS BETWEEN THE RAILROAD AND PLAINTIFF'S PREDECESSORS IN INTEREST LOOKING TO THE ACQUISITION OF A RIGHT OF WAY.

Transactions between railroad and Sherar executors.

On August 9, 1909, Mr. J. W. Morrow, the right-of-way agent of the Railroad Company, called on Mr. Grimes, the managing executor of the Sherar estate, to discuss the matter of a right of way through the Sherar property. According to Mr. Morrow's testimony, the understanding arrived at was that the elevation of the line should be such that a dam sixty feet in height above low-water mark could be constructed (Tr., p. 348).

Letters of Huntington to Morrow.

Mr. Morrow subsequently had a conversation with Mr. Huntington, counsel for the Sherar executors, and the following communication to Mr. Morrow from Mr. Huntington sums up the situation as it existed at that time:

"August 25, 1909.

"Mr. J. W. Morrow,
c/o O. R. & N. Co.,
Portland, Oregon.

"Dear Sir:

"Confirming our telephone conversation of this afternoon the executors of the will of J. H. Sherar, deceased, and who also are attorneys in fact for several of the heirs are willing that the Deschutes Railroad Company shall proceed with the construction of its road across the Sherar lands in the Deschutes Canyon, provided the road is constructed sufficiently above the river *as* that it will not interfere with the use of the property for hydraulic purposes, and the persons who have agreed to purchase the property consent. The executors understand that if the persons who have

agreed to purchase do not take the property that your company will pay One thousand dollars for the right of way. *If the sale is consummated, as we assume it will be, then you are to settle with the purchasers for the right of way.*

"Yours very truly,
"HUNTINGTON & WILSON."

(See Transcript, p. 175.)

Huntington's account of transaction.

Mr. Huntington's account of the conversation preceding this letter is as follows:

"The conversation which led to the writing of that letter, as well as I can remember, was that Mr. Morrow called me to the phone and said that their contractors were very anxious to proceed with the construction work across the Sherar land and wanted to know if I, representing the heirs, would consent to their proceeding. I told him that we were not in position to give our consent; that we had contracted the land to the Eastern Oregon Land Company; that insofar as the heirs themselves were concerned, if the Eastern Oregon Land Company didn't take the land under the option, I thought the heirs would give their consent. Something was said about the price, and I think the price had been talked over before between Mr. Morrow and Mr. Grimes. Anyway, I had been advised that the price for the right of way, if the Eastern Oregon Land Company didn't take the land under the option, would be $1000, the company to so construct its road as not to interfere with the development of the water power at that point, and so as not to interfere with the toll roads which were owned by the heirs at that time; there were two toll roads which they crossed. But I told him that he would have to obtain the assent of the Eastern Oregon Land Company, and thereupon wrote him this letter in confirmation of the telephone conversation, which is as follows:"

(See Transcript, p. 174.)

In April, 1910, Mr. Morrow made an affidavit in which he said: *Morrow's affidavit.*

"That in the presence of J. P. O'Brien, G. W. Boschke, B. F. McLaughlin and myself, the said B. F. McLaughlin, representing himself as being in possession of an option to purchase the Sherar Estate property, when a general discussion was had with reference to the construction of a line of railroad over the same, said Laughlin urged that the road should be built at as high an elevation as possible; in fact, stating to the remaining three, who were representing the railroad interests, that if they would go as high with the grade as they could, they would be satisfied; when the chief engineer, by reference to his profile and maps, stated that it was possible to reach a height so that a dam sixty feet in height could be constructed, and this was agreed upon the part of Mr. Laughlin to be sufficient."

(See Transcript, pp. 358-359.)

And in his testimony in this case he also said: *Morrow's testimony.*

"In the interview between me and Mr. Grimes, when we went to Mr. Huntington's office, he reiterated the statement to Mr. Huntington which he had made to me, and it was understood then that we could go ahead and construct our line. *I think that I negotiated with these people upon the theory that the elevation to which the road should be built was sufficient to admit of the construction of a 60-foot dam.*"

(See Transcript, p. 361.)

And again in his testimony he stated:

"In all our negotiations with any parties interested in that property, the principal point of contention was the height of the dam; the power sites were always interested, in avoiding the possibility of interfering with the construction of the

dam, *and in all these negotiations the height was always at a 60-foot level above the low water flow of the Deschutes River according to my understanding of it, and I think that is right.*"

(See Transcript, p. 363.)

Summary of transaction.

Looking at that testimony and viewing it in the light of the fact that the Hill railroad (which was constructed through the Deschutes River in competition with and at the same time as the Deschutes Railroad) was built at an elevation sufficient to allow the maintenance of a sixty foot dam, it cannot be doubted that the agreements and negotiations between the representatives of the holders of the Sherar property and the Deschutes Railroad contemplated the entry and construction of a railroad over the lines of the Sherar property on the condition, and only on the condition, that the same was to be constructed and maintained so that the development of the power would not be interfered with. It is also apparent that most if not all parties interested believed that power development would not be interfered with if a sixty foot dam could be maintained. This much is absolutely clear from the Record, and, indeed, the lower court, in its opinion, practically affirms this as the condition. These same arrangements were made with the owners of the land of the Development Company and these representations repeated to Laughlin at a time at which it was assumed he was interested as the holder of the option granted by the Sherar heirs.

Summary of transaction. (Continued.)

On August 5, 1909, the Eastern Oregon Land Company acquired from Laughlin the option on the Sherar properties, and it was not until August 9th that Morrow began negotiations with Sherar's executors. The agreement with the executors of Sherar was expressly subject to disaffirmance by the purchaser under the options, if the options were exercised, and the fact that the Eastern Oregon Land Company then owned the option was disclosed. The best evidence of the terms of these agreements is contained in the letter from Huntington to Morrow putting in concrete form the understanding at which these gentlemen had arrived. The letter of August 25th, which put in writing the understanding between the parties, gave the right of way to the railroad on condition:

1. That the road be constructed sufficiently above the river to avoid all interference with the use of the property for hydro-electric purposes.
2. That consent of the prospective purchaser be obtained.
3. That a thousand dollars be paid for the right of way, if the option were not exercised.
4. That if the option were exercised, settlement for the right of way be made by the railroad with the purchaser.

As to the first condition, the oral evidence, both that given on the part of the Railroad Company and that given on the part of the Land Company, establishes conclusively that the defendant thoroughly understood that in order not to interfere with the use of the prop-

Summary of transaction. (Continued.)

erty as immediately contemplated, the road should be constructed so as to permit the maintenance of a dam sixty feet in height.

TRANSACTIONS BETWEEN PLAINTIFF AND DEFENDANT.

Transactions between Martin and Morrow.

Morrow states that he met Martin, president of plaintiff corporation, in the electric car running between Salem and Portland, on August 24th. The

Morrow's account.

meeting was casual, but Morrow testifies that at the time of this chance meeting he knew that the Eastern Oregon Land Company, of which Martin was president, was the holder of the option on the Sherar property, and he declares that he informed Martin of the arrangement which he had negotiated with the Sherar executors, and that Martin promptly consented on behalf of the Eastern Oregon Land Company.

Martin's account.

Martin's account of the conversation differs entirely from that of Morrow. Martin denied that he had assented to any arrangemnet or that the existing arrangement had been outlined. The conversation appears to have been casual. On August 25th, however, Morrow wrote to Huntington as follows:

Morrow's letter to Huntington.

"Huntington & Wilson, Attorneys at Law,
The Dalles, Oregon.

"Gentlemen:

"This will acknowledge receipt of your letter under date of August 25th confirming our conference and understanding over the contention with reference to the construction of our line through the Sherar's Estate property, for which I thank you very much. And at the same time I am pleased to ad-

vise that I talked this matter over with Mr. Martin of the Eastern Oregon Land Company, who has expressed a willingness to have us go upon the land to construct our line.

"Very truly yours."

Morrow's letter to Huntington. (Continued.)

(See Transcript, p. 353.)

It is possibly worthy of note that Morrow does not claim that Martin did anything more than to assent that they go on the land. *He does not here claim that Martin adopted the agreement of the Sherar heirs or waived any right to compensation.* On August 27th, Huntington, writing to Balfour, Guthrie & Company, the general agents in Portland of the Eastern Oregon Land Company, informed them that the arrangement between the Sherar heirs and Morrow was wholly subject to the approval of the Eastern Oregon Land Company, and that Mr. Morrow had sent a letter to him in which he stated that Mr. Martin of the Eastern Oregon Land Company had expressed a willingness to have the Railroad go upon the land to construct the line. The letter of August 27th from Huntington to Balfour, Guthrie & Company is as follows:

Huntington's letter to Balfour, Guthrie & Company.

"Messrs. Balfour, Guthrie & Company,
Portland, Oregon.

"Gentlemen:

"In re Sherar lands. We are in receipt of yours of the 27th and note your suggestions with respect to rights of way. The assent of the representatives of the Sherar heirs to the crossing of the lands is conditioned entirely upon their obtaining the assent of the Eastern Oregon Land Company or

Huntington's letter to Balfour, Guthrie & Company. (Continued.)

whatever person or company is the proposed purchaser under the Laughlin option. We have a letter from Mr. Morrow, dated yesterday, in which he states that he has seen Mr. Martin and obtained his consent that the Deschutes Company proceed to build across the lands. He said, 'I am pleased to advise that I talked this matter over with Mr. Martin, of the Eastern Oregon Land Company, who has expressed a willingness to have us go upon the land to construct our line.' The representatives of the heirs are fully aware that they have no right at this time to consent to anything with respect to a right of way only as it meets your entire approval. If you or Mr. Martin have not given consent to their proceeding with the construction of their road, it is obvious his, Morrow's, mind should be disabused of an apparent impression he has received from the conversation with Mr. Martin. In our telephone talk and in our letter confirming the same, we conditioned the assent of the heirs upon their obtaining the assent of the persons who have agreed to purchase the property, and Mr. Morrow must understand that we are not in any way consenting to any act which is not entirely assented to by you. No negotiations have been opened with the Oregon Trunk line as yet. We have advised their right of way agent that a sale of the property is about to be consummated and that we cannot grant any right of way only as it is done with the consent and approval of the purchasers. No payment will be accepted from either company for a right of way until it is determined whether or not this sale is to be consummated. Yours very truly,

"HUNTINGTON & WILSON."

(See Transcript, pp. 353-355.)

Summary.

It should be noted that if Morrow be correct in the statement contained in his letter, that is, if Martin actually assented to the arrangement made with the Sherar heirs, Martin merely assented to the following propositions:

(a) The construction of a railroad across the lands in such manner as not to interfere with the use of the property for hydraulic purposes. *Summary. (Continued.)*

(b) The payment of such compensation as might thereafter be fixed between the Eastern Oregon Land Company and the railroad, as the provision relating to the payment of One Thousand Dollars was confined to a purchase from the Sherars and was not to carry over and be binding upon their successors.

In other words, Martin waived condemnation proceedings and payment in advance of taking, on the condition that the line be located so as not to interfere with the development of power.

THE CONSTRUCTION OF THE RAILROAD.

As originally projected, the railroad followed the river on a water grade.

In March, 1909, before any negotiations took place between the railroad and the people interested in the land, a re-survey was made looking to the elevation of the line (Tr., p. 483). The order to commence work was given August 25, 1909 (Tr., p. 483), and the work commenced in September (Tr., p. 419). The grading was completed in April or May, 1910 (Tr., p. 423). Ties and rails were not laid until October, 1910. There was no railroad in existence on the land at the time this suit was commenced or at any time prior to October, 1910 (Tr., p. 423). The Re-Survey. The Commencement and Prosecution of Work.

As stated, the railroad entered upon the land and started grading in September, 1909.

The grade as constructed was over sixty feet above

The actual grade.

the mean low-water level of the river, so that a sixty-foot dam could be constructed and the maintenance of a dam of that height would not, except in time of flood, interfere with the operation of the road, save at the point at which the moving body of the stream entered the back water of the dam and produced a wave.

Whistler's Conversation with Boschke.

In October, 1909, Whistler, one of the engineers of the Eastern Oregon Land Company, called on Boschke, the engineer of the Railroad, in order to find out what the location of the line was going to be. Boschke showed Whistler certain profiles *which did not give the datum level,* but Boschke informed Whistler that the grade was seventy feet above the water line. Boschke says:

Boschke's account.

> "When I gave Mr. Whistler the profile, which seemingly was on the 29th of October, I may have discussed the height at which the grade was being constructed, and I may have informed Mr. Whistler that the road was being constructed at a height sufficient to permit the construction of a dam at the dam site of the Interior Development Company, 60 feet in height. I must have done it if it is in that affidavit; I probably did."
>
> (See Transcript, p. 339.)

Boschke's testimony shows, in all probability, the exact attitude the Railroad assumed towards the Land Company when Whistler called upon him; this testimony being as follows:[1]

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1 It should be borne in mind in this connection that the resurvey of the road was in existence and fully completed prior to August, 1909, and that this survey was made pursuant to directions given in March, 1909, before negotiations had been opened with any of the persons interested in the land in August, 1909 (Tr., p. 423).

"Q. How high a dam did you calculate could be built at the dam site without interfering with your road? *Boschke's account. (Continued.)*

"A. *I wasn't making any figures on the dam site at all, or the dam. I was building a railroad there, and building it as high as I could get up, starting at eight-tenths grade at the tunnel.*

"I think a dam readily could be built there 60 feet or over without flooding our track or right of way so as to interfere with our railroad, if the flood waters were properly taken care of.

"Q. Why weren't you building your road so as to guard against flood waters?

"A. As I said before, *my object was to build a railroad there, and I was ordered to build it as high as I could, going up the maximum grade from the tunnel, and there wasn't any dam built there at that time, and there wasn't any dam built there at that time, and there isn't to-day. In my opinion, though, a dam could be built there 60 feet, and probably would be all right, except might flood our slopes, and in that way soften them up and injure the railroad, where the slopes run down into the river."*

(See Transcript, p. 339.)

Summary.

In other words, the road was built along a line surveyed and determined on prior to negotiations with the land owners.[1] *No attempt was made to fulfill the promises given by the company to secure the right of entry, or to ascertain whether the line theretofore determined on would, if adhered to, be sufficiently high to comply with the obligation assumed* (Tr., p. 381).

Whistler's report to the Land Company.

Whistler reported to the Eastern Oregon Land Company that he had been unable to ascertain from the profile given him by Boschke the elevation of the road

[1] The resurvey was made after the conversation between Laughlin and O'Brien had taken place. In August, 1909, Laughlin transferred his option to the Land Company.

Whistler's report to the Land Company. (Continued.)

above the level of the river at the proposed dam site, but that Mr. Boschke had stated that from the information he had in his office he believed the elevation to be about seventy feet above water surface at the dam site.[1] In Boschke's account of what took place, he says:

Boschke's testimony.

> "He (Mr. Whistler) spoke of the upper end, the way our grade lay, where the water came down, coming down the natural grade of the river, would reach the water backed up from the dam; it would probably flood our grade in there. *I said to him, that part of it, we would readily change that when the time came; when he had a dam there, but I did not believe in spending any money to change that at this time.*"
>
> (See Transcript, p. 333.)

Conduct of the Land Company.

After receiving this information from Whistler, the Land Company employed J. G. White & Company to report (Tr., pp. 506-7). Their report was made in March, 1910 (Tr., p. 184). Prior to receiving the White report, the Land Company did not know what had been done (Tr., pp. 186, 204). Indeed, Owre, the engineer in charge of construction of the railroad, declared that in December, 1909, it was not apparent at the dam site where the grade would be located (Tr., p. 403).

In February, 1910, legal title to the Sherar properties was vested in the Eastern Oregon Land Company and promptly after the acquisition of title and the receipt of the report of J. G. White & Company by

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1 Whistler made two visits to Boschke, one on October 6th and one on October 29th. On both occasions Whistler was assured that the elevation of the road was sufficient to permit construction of a 60-foot dam. After the first visit, he expressed doubt as to the truth of the statement, which lead to the employment of White & Co.

which the Eastern Oregon Land Company was informed that the construction of a 100 foot dam was desirable; that the line on which the grade of the railroad had been constructed was such that the maintenance of a dam sixty feet in height would result in the flooding of the railroad tracks during high water —this proceeding was commenced.

Conduct of the Land Company. (Continued.)

PLEADINGS AND PROCEEDINGS IN THE LOWER COURT.

On April 18, 1910, before any rail was put down, the Eastern Oregon Land Company filed its bill in the United States Circuit Court for the District of Oregon. The object of the action was to restrain the Deschutes Railroad Company from constructing a railroad across the lands of the plaintiff. The bill alleged that the defendant had entered upon the property of the Land Company without right or authority and was engaged in constructing the road. It was further charged that the line on which the defendant company was proceeding to construct its road would, if adhered to, prevent the Land Company from utilizing its land for the storage of water and development of power, a use to which the land was peculiarly adapted.

The original bill and petition for preliminary injunction.

The defendant resisted the issuance of a preliminary injunction, asserting in the affidavits presented by it the following claims:

Grounds upon which the issuance of the injunction was resisted.

(a) The Railroad Company entered upon the property under a license by which it was permitted to enter upon the property and con-

Grounds upon which the issuance of the injunction was resisted. (Continued.)

struct its line at a point which would permit the construction of a dam 60 feet above low water.

(b) This license was granted by plaintiff's predecessors in interest at a time at which plaintiff was the holder of an option to purchase the property, and plaintiff knew this license had been granted and approved and sanctioned the grant and concurred therein.

(c) The line on which the road was located was more than 60 feet above low water and permitted the construction of a 60 foot dam.

Decision denying preliminary injunction.

The Circuit Court refused to grant a preliminary injunction, basing its decision on the ground that the entry on the land was made with the consent of the then owner *and that the purchaser was at liberty to construct a dam sixty feet high and that in any event this was all it could do before final hearing.*

The amended bill.

On June 4, 1910, after the preliminary injunction had been refused for the reasons stated, an amended complaint was filed. In this bill it was alleged that the Land Company was the owner and in possession of the real property situate in the Deschutes Cañon, which had been purchased for the express purpose of generating hydro-electric power; that in the execution of this object, plaintiff had expended large amounts of money. The entry of the Railroad Company upon the lands without right was again alleged, and it was further charged that if the railroad were constructed along the proposed line, the value of the

lands would be seriously impaired, as the grade adopted would prevent the construction of a dam of more than 54 feet in height. It was further charged that the defendant claimed that it had entered on the land and commenced construction under a license given by the plaintiff and its predecessors in interest, one of the conditions of such asserted license being that the defendant was to so locate its line as to permit the construction of a dam sixty feet in height. The complaint alleged that no such license had been granted by plaintiff, and inquiries from the predecessors in interest of plaintiff elicited the information that no such license had been given by them. But, under any circumstances, the line as located did not conform to the license asserted, as the line was so located that a dam of only 54 feet could be maintained. This complaint further charged that, in grading on its proposed line, the defendant had thrown large quantities of rock and earth over other lands of the plaintiff, occasioning damage thereby.

The amended bill. (Continued.)

The second amended complaint, upon which the case was tried, is much more elaborate than the original pleadings. This pleading deraigns the plaintiff's title to various parcels of land, and contains a detailed statement of facts not here recapitulated, though all material facts are set forth.

Second amended bill.

The answer of the defendant interposes various defenses, which may be summarized as follows:

The Answer.

Defenses Interposed.

1. It is claimed that as plaintiff acquired legal title after the entry of the defendant and the partial construction of the grade, the plaintiff cannot maintain the action.

2. That the defendant entered into possession under an agreement with Laughlin by which it was provided that, if the road should be constructed as high as the same could conveniently be raised without making the expense prohibitive and without interfering with the proper and convenient operation of the line, the damages would be nominal; that Laughlin and the Interior Development Company at all times knew where the road was located and never protested; that the Sherar heirs knew of the actual location of the line and approved the same; that the consent of complainant was expressly obtained and complainant agreed to accept the sum of one thousand dollars compensation if it exercised its option on the Sherar properties.

3. That the road was so constructed that a dam 60 feet high could be maintained.

4. That by filing its map of definite location, the right of way of the defendant took priority over the title of plaintiff to the parcels of land on which the lieu selections of 1906 were contested and to which patent did not issue till 1913.

Prayer for equitable condemnation.

The answer concludes with a prayer to the effect that equitable condemnation be decreed to such extent as may be necessary, in the event the other defenses set up do not prevail.

THE DECISION.

The Opinion of the Lower Court.

The decision of the lower court rested on two propositions of law:

First opinion.

1. The court was of the opinion that in view of the fact that plaintiff did not exercise its option and purchase the Sherar property until after the railroad had entered into possession and commenced construction, ejectment did not lie and damages alone could be recovered.

2. That plaintiff was not the person entitled to recover damages, as it paid the purchase price and acquired the legal title to both the Sherar and Development Company properties after the defendant was in actual possession.

Second opinion rendered on rehearing

On rehearing the court modified its views. As to part of the land in controversy, viz., that purchased from Sherar under the option, the court practically repudiated the original decision and declared that the plaintiff was entitled to maintain the action and that equitable condemnation should be decreed as to part of the land occupied.

The conclusion ultimately reached.

The decision on rehearing was to the following effect:

(a) So far as property acquired from the Interior Development Company was concerned:

The court adhered to the view expressed in the original opinion.

(b) As to property acquired from the Sherars, for which the United States patents did not issue

The conclusion ultimately reached. (Continued.)

till 1913, on account of the contest initiated between Sherar and the Development Company in 1906:

The court held that the title of the Railroad was superior to the title of the Sherars.

(This portion of the decision merely followed the rule declared in the decision of Judge Bean in *Daniels* v. *Wagner*, and affirmed by this court, 205 Fed., 235. This decision has since been reversed by the United States Supreme Court, 237 U. S., 547.)

(c) As to other property acquired from the Sherars:

1. The court concluded that as the plaintiff purchased pursuant to an option outstanding at the time the defendant entered upon the land, the original opinion was erroneous and plaintiff had a right to maintain the action.

2. That equitable condemnation be decreed.

3. Concerning compensation, the court said:

"The evidence shows that the defendant railway is located along the sides of a steep canyon over land of but little if any substantial value. There is no evidence in the record as to the quantity of land occupied by the road nor its value, but since the defendant admits and alleges that it agreed to pay the Sherar heirs a thousand dollars for the right of way in case the holder of the option did not purchase, I assume in the absence of other evidence that such an amount is a reasonable compensation to be paid for the land taken.

"A decree will therefore be entered adjudging that defendant is the owner of a right of way 200 feet wide over and across the land."

(See Transcript, pp. 124-125.)

THE FINAL DECREE.

By the final decree it is adjudged:

(a) Concerning the N½ of the SW¼ of Sec. 35, Township 3, and Lot 2, Sec. 3, Township 4 (This is the land designated "C" on the map, of which Sherar was in possession since 1871; on which he filed a lieu selection in 1906, and to which he obtained a patent in 1913; the claim of the Railroad being based on a map of definite location filed November, 1908): The Sherar Bridge Properties.

1. "That the defendant is the owner of a right of way two hundred feet in width, being one hundred feet on each side of the center line of its railroad track as constructed over and across this property."

2. "That the title of complainant to said property was acquired subsequent to the acquirement of said right of way of defendant over said property and the same is subject to such right of way, provided, however, that the right thereby decreed to defendant shall not be understood or considered to interfere with or deprive complainant or its successor in interest of the right to construct and maintain a dam for hydraulic purposes in the Deschutes River where it passes through such property and installing in connection therewith appliances for the purpose of developing hydraulic and electric power for all purposes, provided the track or roadbed of defendant shall not thereby be flooded or damaged, or the operating of its road interfered with."

(See Transcript, pp. 126-127.)

(b) Concerning SE¼ of Sec. 34, Township 3, SW¼ of NE¼, the W½ of SE¼, the E½ of SW¼ of Sec. 3, the NW¼ and the NW¼ of the SW ¼ of Sec. 10, Township 4 (This is part of the land patented to Sherar prior to January 27th, 1906, and conveyed to Other Sherar lands actually crossed by railroad.

Other Sherar lands actually crossed by railroad. (Continued.)

plaintiff, the railroad being actually located thereon.), the decree declares:

"It appearing to the court that the defendant has paid into the registry of this court the sum of one thousand dollars in accordance with the opinion of this court, rendered and filed on the 12th day of October, 1914, it is hereby ordered, adjudged and decreed that the said defendant be, and it is hereby, decreed to be the owner of a right of way for its line of railroad as now constructed over and across the said land."

"That the defendant, its lessees, successors and assigns be and they are hereby declared to have the right to maintain the railroad of defendant as now located and constructed over said lands, together with necessary cuts, slopes and safe supports therefor, and the right to maintain and operate its trains thereover without interference on the part of complainant, its officers, agents, servants or employees, in any manner whatsoever, except as permitted by this decree."

(See Transcript, pp. 128-129.)

Sherar land embraced in reservoir site but not crossed by road.

(c) Concerning the other land purchased by plaintiff for a reservoir site, of which the property above described is but an integral part, the decree declares:

"It is further adjudged and decreed that the line of railroad of the defendant, Deschutes Railroad Company, does not cross or touch the same."

"* * * and said lands are immaterial to this controversy."

(See Transcript, p. 129.)

(d) Concerning Lot 1, Sec. 3, Township 3, and the NE¼ of the SE¼ of Sec. 9, Township 4 (this being the land purchased from the Interior Development Company) the decree is as follows:

Land acquired from the Interior Development Company.

1. "That defendant's line of railroad was constructed over and across the land at the place where it is now located pursuant to and in accordance with an agreement entered into between the defendant and the Interior Development Company, the owner of the tract of land at the time of said agreement with the defendant, and at the time of the entry thereon and the construction thereover of defendant's line of railroad, it being understood and agreed that the location of defendant's track should not interfere with or deprive the Development Company and its successor in interest of the right to construct and maintain a dam in the Deschutes River where it flows through such property, for hydraulic purposes, and to install in connection therewith appliances for the purpose of developing hydraulic and electric power for all purposes, provided, however, that the track and roadbed of defendant should not thereby be flooded or damaged or the operation of its road interfered with."

2. That complainant acquired this property "after the construction thereover of the defendant's line of railroad and subject to defendant's right of way thereover, and the defendant is hereby decreed to be the owner of a right of way over and across said lands for its tracks and roadbed and the slopes and cuts thereof and the necessary and safe support therefor, and for the safe and convenient operation of its line as hereinbefore set out, and it is adjudged and decreed that the complainant, its officers, agents, servants and employees, and all persons acting by, under or for it, be and they are hereby restrained and enjoined from in any manner interfering with the maintenance of said railroad over said lands, and from interfering with or obstructing in any manner the operation of said line of railroad over said property, except as permitted by this decree."

(See Transcript, pp. 127-128.)

THE EFFECT OF THE DECREE.

It is quite apparent that as a result of the decree the location of the defendant's railroad is in all respects confirmed and approved, regardless of its effect upon the value and utility upon the property of plaintiff as a whole, the plaintiff being awarded $1000 as compensation for a right of way about four miles in length.

It is equally apparent that the decree should not be sustained unless,

1. The plaintiff has lost its right to object, as a result of some agreement made by itself or by its predecessors in interest, or
2. The plaintiff has as a result of some improper conduct been estopped from asserting any claim of damages.

It is also clear that a portion of the decree must be reversed unless the title acquired by Sherar as a result of his occupation of a part of the property since 1871, his lieu selection made in 1906, and his patent issued in 1913, is subordinate to the right acquired by the railroad through filing its map of definite location in November, 1908.

Again, the decree must be reversed unless the sum of $1000 awarded to plaintiff in equitable condemnation is shown by the evidence to be the fair value of the property taken. And on this question the burden of proof is on the defendant.

ASSIGNMENT OF ERRORS.

I.

The court erred in declaring that the defendant had by virtue of its location in 1908 acquired a right of way over the N½ of SW¼ of Sec. 30, Township 3, and Lot 2, Sec. 3, Township 4, superior to plaintiff's title to that property.

II.

The court erred in not declaring that plaintiff was entitled to erect and maintain a dam 60 feet high irrespective of the effect thereof upon the railroad of the defendant.

III.

The court erred in failing to award to the plaintiff damages sufficient to fairly compensate it for the injury suffered by reason of the construction of the road and the acts complained of.

IV.

The court erred in declaring that $1000 was fair compensation for the right of way awarded to defendant over the property of plaintiff.

Summary of questions presented for review.

ARGUMENT.

The evidence in this case shows without conflict that plaintiff is the owner of a tract primarily valuable for the production of hydro-electric power; that plaintiff has expended in the acquisition of this property and in preparation for the development of hydro-electric power thereon, $190,000.00; that the construction of the defendant's railway across this land has substantially lessened its value.

In view of these facts, it is obvious that plaintiff is entitled to relief and to substantial damages if equitable condemnation be decreed, unless on account of the existence of other facts this right has been lost or waived.

The defendant asserts two grounds for the claim that plaintiff is not entitled to substantial relief:

(a) That the plaintiff's title to the Sherar Dam Site is subordinate to defendant's easement of a right of way; that this fact of itself destroyed the power possibilities of the property as a whole.

(b) 1. That plaintiff's predecessors in interest entered into a contract with defendant by which it was agreed that all claims of damage would be waived should defendant raise the elevation of its grade to as high a point as it might find both convenient and economical; that defendant performed its contract and expended $100,000 in raising its grade.

Summary of questions presented for review. (Continued.)

2. That the plaintiff had notice of this agreement at the time it exercised its option.

3. That the plaintiff is estopped from claiming that the grade adopted does not conform to the contract.

In the last opinion rendered by the lower court, and in the final decree, the court rests the decision on the claim based on title, not the claim based on contract and estoppel. In the first opinion the court expressed an inclination to support the claim of estoppel, but based its decision on other grounds.

In the view we take of the case, the claims are inconsistent. If the case is to be decided on the basis of contract, the question of title becomes immaterial. However, neither claim affords support to the decree. The claim of title is admittedly based on a decision since overruled by the Supreme Court. The contract asserted differs radically from the contract disclosed by the evidence. The claim of estoppel is shown to be without foundation by the evidence of the defendant.

PART I.

THE TITLE OF PLAINTIFF TO LOT 1 OF SEC. 3, AND THE NE¼ OF THE SE¼ OF SEC. 9, TOWNSHIP 4, RANGE 14 EAST, W. M., WAS NOT SUBJECT TO AN EASEMENT VESTING IN THE RAILROAD COMPANY THE RIGHT TO CONSTRUCT ITS RAILWAY ACROSS THE SAME.

History of Sherar's title.

The history of the Sherar title to the land above mentioned is set out in the decision of Mr. Pierce, First Assistant Secretary of the Interior. The following is a quotation from the opinion rendered in disposing of the contest which arose between Sherar and the Interior Development Company over this property:

* * * * * * *

The decision of the Land Department.

"On January 26, 1906, the Santa Fe Pacific Railroad Company by A. L. Veazie, attorney in fact, filed selection under the act of June 4, 1897 (30 Sta., 36) for the above described tracts * * *"

* * * * * * *

"On February 13, 1906, the Santa Fe Pacific Railroad Company, by J. H. Sherar, attorney in fact, presented three applications to select under the act of June 4, 1897, which included these same tracts, together with a duly corroborated affidavit of protest: (1) that at the date of the said lieu land selection was made by the said A. L. Veazie no portion of said land was vacant land opened to settlement; (2) that each and every legal subdivision thereof was at the date of said selection occupied by said protestant under a claim of ownership, and had been so occupied for more than four years prior to the date of said selection; (3) that no portion of said above described tracts at the date of said selection was vacant land open to settlement, but each and every subdivision thereof was and had been occupied and in

the exclusive possession of the protestant for more than twenty-five years prior to the date of said selection."

* * * * * * *

"In 1871, J. H. Sherar bought out the interest of a predecessor, the purchase including a toll bridge across the Deschutes River, and his place was thereafter known as Sherar's Bridge. The land at the time was not surveyed. According to his statement, he paid six thousand dollars 'for the road and the land rights; I paid six thousand dollars for the road and the land along the river there.' Sherar claimed that the land included in his purchase was 'that along up and down the river from the mouth of White River down to the mouth of Buck Hollow.' After the public surveys were extended over that section of country, Sherar made homestead entry for the SE¼ Sec. 34, T. 3 S., R. 14 E. At the time he made such entry he supposed that it included the falls in the river, and not until 1901 did he discover that the south line of his homestead did not run south of said falls. He then took steps to acquire title to the land upon which the falls are situated, as well as the SE¼ NW¼ Sec. 3, and the N½ SW¼ Sec. 35. He already owned, in addition to his homestead, the SW¼ NE¼ Sec. 3, and other lands up the Deschutes River toward the mouth of White River.

"The lands in question were included in a selection list, of the State of Oregon. They were sold by the State to Annette Mitchell, a clerk in the office of Sherar's agent at The Dalles, who assigned her certificate to Sherar June 7, 1901. From that time until Veazie's selection, it appears that Sherar believed that he was the owner of these tracts, or was in a position to acquire title thereto.

* * * * * * *

"From 1871 Sherar continued to reside in the canyon, and to use and occupy the lands therein, both above and below the bridge, until his death. He was engaged in building and repairing roads and in the sheep business. These lands were used by him in the same way as the

The decision of the Land Department. (Continued.)

lands embraced in his homestead, which was not fenced because it was deemed unnecessary on account of the character and location of the land. He supposed he owned the NW¼ NE¼ Sec. 3, on which the falls are located, because in his original purchase he had paid for the possessory right thereto, along with other lands. The forty was crossed by his toll roads on both sides of the river. He had, and used, a private road on the east side of the river, between the toll road and the river. On the west side and near the falls he for many years maintained a hydraulic ram for the purpose of supplying his home with water. A wing dam, about one hundred feet in length, was built out into the river. This forty was also used by Sherar as a feeding and bedding ground for his sheep. He also built a fish house, with a canal or flume leading thereto. The remains of these improvements may still be seen. The N½ SW¼ Sec. 35 is about equally divided by the Deschutes River. The N½ of the eighty is practically inaccessible except through an enclosure on Sherar's homestead, and was used by him as a hog pasture and lambing ground. It was also used as a place for catching drift wood coming down the river, and a private roadway was constructed by Sherar which ran nearly to the center of Sec. 35 and over which he hauled drift wood and feed for his sheep. The south of the eighty was used principally for grazing purposes.

"The evidence shows that Sherar used the lands for the purposes for which they were best adapted.

* * * * * * *

"The lands were generally recognized as belonging to or claimed by him; not only that, but they were so recognized and treated by the Interior Development Company, the ultimate beneficiary of the Veazie selection. In 1905, after looking over the premises, a representative of that company offered Sherar sixty thousand dollars for his holdings, including the lands in controversy. Again, in 1906, an option for five thousand dollars was executed by Sherar and his wife agreeing to convey their holdings to a repre-

The decision of the Land Department. (Continued.)

sentative of the Interior Development Company, for a consideration of seventy-five thousand dollars. This option covered all the lands in the canyon from Buck Hollow to the mouth of White River. The option was never exercised, it evidently being considered that possession of the valuable water power site could be secured at less cost through other means. The transaction shows, however, that the parties interest in the Veazie selection had full knowledge of the status of the lands in the canyon, and but confirms Sherar's claim of occupancy. There was evidently something on or in connection with these lands which charged parties with notice of Sherar's claim thereto. This is evidenced by the attempt to purchase his rights before the Veazie selection was made.

"It is not deemed necessary in this connection to discuss at any length the rules and decisions governing determination of what is or is not 'vacant land' within the meaning of the law generally, or under the particular Act of June 4, 1897. It is well settled under the authorities that any visible or notorious acts clearly evidencing an intention to claim ownership are sufficient to establish adverse possession. For this purpose there need not be a fence, building or other improvements. If a person claiming land exercises acts of ownership over it, using it for the purposes to which it is adapted, he may be regarded as in actual occupancy. In the case of *Jones* vs. *Arthur* (28 L. D., 234) it is said:

"'It is true that the tract has been only partially improved and cultivated, but it had been used and occupied in connection with other lands for twenty-three years preceding the entry of Arthur, by those who beyond question must have believed their title to be good particularly as warranty deeds were passed by the State.'"

(See Transcript, pp. 613-614, 617-621.)

Sherar selection.

Sherar's selections were made in February, 1906, almost three years before the Railroad Company filed its profile with the Registrar, viz., November 8th, 1908. Owing to the contest between Sherar and the Interior Development Company, which was not decided until 1909, Sherar did not establish his right to these lands till that date. But in April, 1906, the first temporary withdrawal order was made for irrigation works. This order was made more than two years before the railroad's map of location was filed. In February, 1913, the selections of Sherar were approved, the withdrawals canceled, and the patents issued; all for the purpose of recognizing Sherar's equities.

First withdrawal order.

Issuance of patent.

It is, of course, true that legal title did not vest in Sherar or his successors until the final approval of his selection and the issuance of patent. It is also true that there intervened between the date of the presentation of the selection and the date of approval,

1. The temporary withdrawal orders.

2. The filing by the Railroad of its map of location.

Daniels v. Wagner.

Prior to the decision of the Supreme Court in *Daniels* v. *Wagner,* 237 U. S., 547, it had been held by Judge Bean and also by this court that the rights of one making a lieu selection under the Act of June 4, 1897, were wholly inchoate and did not confer any equitable interest or estate until the acceptance of the offer and approval of the department; that as a

consequence, if any title or right intervened, it took priority to the lieu selection. In *Daniels* v. *Wagner,* 237 U. S., 547, these decisions were overruled, the court holding that one presenting a lieu selection and complying with the laws and regulations of the department obtained a full equitable title at once; that no discretion was vested in the department and the right of the selector was prior to that of a subsequent patentee. This case reversed the decision of Judge Bean in *Daniels* v. *Wagner,* 194 Fed., 973, affirmed by this court in 205 Fed., 235.

These decisions since reversed by the Supreme Court are admittedly the basis of that portion of the decision of the case at bar now under consideration. Indeed, this is declared to be so in the opinion of the lower court, where it is said:

> "In my judgment the subsequent approval of a prior application of the Santa Fe Railroad Company by its attorney in fact to select such lands in lieu of other lands under the Act of June 4, 1897, did not relate back to the date of the application and supersede the rights of the railway company acquired by the approval of its map of definite location. The right of selection given by the Act of June 4, 1897, is but an offer by the government to exchange one tract of land for another and the selector obtains no right or interest to the lands selected by him until the offer is accepted by the proper government officers. His rights in this respect are, I think, to be distinguished from those of a settler under the homestead or preemption laws or a claimant under the mining laws, or the rights of a railway company under a Congressional Grant to aid in the construction of its road in lieu of lands

which are lost in place limits" (*Daniel* vs. *Wagner,* 205 Fed., 235).

(See Transcript, p. 123.)

The rights of Sherar acquired under the lieu selection are prior to the rights of the Railroad.

As the decision of the Supreme Court in *Daniels* v. *Wagner* destroys the very basis on which the opinion rests, and as it is well settled that the Act of March 3, 1875, does not operate to convey a right of way over land in the possession of one who has taken all steps within his power to acquire title and has the right to acquire title thereto (*Washington & Idaho R. R.* v. *Ostorm,* 160 U. S., 103; *Spokane Falls Ry.* v. *Ziegler,* 167 U. S., 73), the decision in the case at bar is erroneous.[1]

Indeed, the Railroad Company never acquired a right of way over the land in question, irrespective of the rights of Sherar under his lieu selection.

THE RAILROAD COMPANY NEVER OBTAINED A RIGHT OF WAY OVER THE SHERAR BRIDGE PROPERTIES UNDER THE ACT OF MARCH 3, 1875.

On February 13, 1906, J. H. Sherar made and filed his lieu selection of the land in question.

Withdrawal orders.

On April 26, 1906, all land in Township 3 was temporarily withdrawn for irrigation works, pursuant to the power conferred by the Act of June 17, 1902. On October 24, 1908, a similar withdrawal was made of lands in Sec. 3, Township 4. Thus, all this land was withdrawn prior to November 8, 1908, the day on which the Railroad filed its map of location.

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1 It is well settled that though delay occur in the issuance of a patent, the rights of the patentee are not prejudiced thereby, but the patent relates to the time at which his right to it was complete.

Cosmos v. Gray Eagle Co., 112 Fed., 4, 11; 23 Sup. Ct., 696;
Santa Fe v. Nor. Pac., 38 Land Dec., 402;
Weyerhauser v. Hoyt, 219 U. S., 380; 31 Sup. Ct., 300.

Act of March 3, 1875, has no application to withdrawn lands.

The Act of March 3, 1875, does not, of course, operate to grant a right of way over land withdrawn for such purposes as this. Indeed, such right of way would seriously impair the object of the withdrawal. In the case of the *Grand Canyon Scenic Ry. Co.* 36 L. D., 394, Secretary Garfield said:

Scenic Railway case.

> "The Grand Canyon Scenic Railway Company has appealed to the Department from your office decision of February 27, 1908, rejecting its applications for rights of way, under the provision of the act of March 3, 1875 (18 Stat., 482), over lands reserved by the President's proclamation of January 11, 1908, on account of the creation of the Grand Canyon National Monument.
>
> "The reservation made by said proclamation is authorized by the act of June 8, 1906 (34 Stat., 225), and by the express terms of the proclamation all the lands covered thereby are—
>
> "'reserved from appropriation and use of all kinds under all of the public land laws, subject to all prior, valid adverse claims.'
>
> "Unless, therefore, the railway company had, at the date of the creation of the Grand Canyon National Monument, initiated a prior, valid adverse claim, the Department is without authority to approve its applications for rights of way. It is clear also that the existence of such claim depends upon actual construction of the road for which right of way is sought and not upon the filing and approval of maps of definite location, as no maps were tendered for approval until after the reservation was made."

Ruling of Secretary Hitchock

The opinion of Assistant Attorney General Campbell, approved and adopted by Secretary Hitchcock, is also directly in point. The opinion declares that no rights can be acquired by railroads under the Act of

Ruling of Secretary Hitchcock (Continued.)

March 3, 1875, over land withdrawn for irrigation work pursuant to the Act of June 17, 1902 (32 L. D., 597).

Any question which might arise concerning the interpretation of the Act of March 3, 1875, is settled by Sec. 5 of the Act itself, which declares:

Sec. 5 of the Act of March 3, 1875.

> "That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed (18 Stat. L., 483)."

6 *F. S. A.*, 506-507.

The third section of the Act of June 17, 1902, pursuant to which the withdrawals in question were made, in terms prohibited any entry on lands while temporarily withdrawn pursuant to the directions of the statute.

7 *F. S. A.*, 1099.

U. S. v. Hanson.

In *U. S.* v. *Hanson,* 167 Fed., 881, the court held that no right could be initiated on public land after the same had been withdrawn for the purpose of establishing irrigation works thereon, until the withdrawal was set aside. This case points the distinction between lands withdrawn for the purpose of establishing irrigation works thereon, and lands withdrawn for the purpose of subjecting them to irrigation and subsequent sale.

Summary.

Thus, when the original map of location was approved June 20, 1910, the act of approval did not operate to give title to the Railroad over the lands in question which were not subject to the provisions of the Act of 1875 either at the time the map was filed or on the date of its approval. Indeed, on July 2, 1910, the President, acting under the Act of June 25, 1910, confirmed and continued in force these prior withdrawal orders. This condition subsisted "until "February 25, 1913, when the withdrawal orders "were canceled as to the lands included in said selec- "tions of Joseph H. Sherar, in order to allow patents "to issue on said lieu selections" (See Transcript, p. 163), and the patents issued simultaneously with the cancellation of the orders.

We respectfully submit that the decision of the lower court is erroneous not only for the reasons stated in *Daniels* v. *Wagner,* 237 U. S., 547, but for the further reason that at the time the profile map was filed, the lands in question were not subject to the Act of 1875, and that the subsequent cancellation of the withdrawal orders was made by the President for the purpose of patenting the land to Sherar's successors, and was no more than a recognition by the President of Sherar's full, equitable right.

PART II.

THE RIGHT OF THE PLAINTIFF TO OBJECT TO THE LOCATION OF THE ROAD AS NOW CONSTRUCTED WAS NOT LOST BY REASON OF ANY AGREEMENT BETWEEN LAUGHLIN AND THE RAILROAD COMPANY.

The road as constructed is jeopardized in time of flood by the maintenance of a fifty-five foot dam. In order to justify the existing condition, the Railroad Company claimed that Laughlin, from whom the Land Company acquired the option over the Sherar property, had assented to the construction of the road provided a 55-foot dam might be maintained. It was also asserted that this arrangement was binding on the plaintiff.

NEGOTIATIONS BETWEEN LAUGHLIN AND THE RAILROAD COMPANY.

Mr. O'Brien, vice-president of the Deschutes Railroad Company, testified on his direct examination as follows:

Testimony of O'Brien.

> "He (Laughlin) asked me how high we could get up in the air at Sherar's. I told him I did not know. That would be a question of cost. As a result of it, I sent for Mr. Boschke, our chief engineer, who has charge of running the lines. I told Mr. Boschke to run a line there and see how far he could get up at Sherar's without making the cost prohibitive. I asked Mr. Boschke in a general way if he had any idea or if he could get any idea from the data he had in his possession at that time, as to how high he could go without making the cost prohibitive, and he said, in

the neighborhood of 58 or 60 feet, along in there. I asked Mr. Laughlin if that would be satisfactory at that height, along in there between 58 and 60 feet. Mr. Laughlin said he thought that would be satisfactory. Of course, any height that we could go above where the line was laid at that time was going to help them out."

(See Transcript, p. 318.)

"I asked Mr. Laughlin, when we got along in our discussion of the matter, in a general way, I asked him how about the right of way. And I said we were spending a great deal of money in building the line; that the line was going to overrun badly on account of our not figuring on these different power propositions, and it was of considerable concern to me for the reason that I had recommended the line very strongly to our principals in the east; that I had submitted an estimate covering about what the approximate cost would be, and I knew from the figures that were at hand at that time, that the cost was going to be greatly exceeded, and I asked how about the question of right of way. He said he did not think there would be any question about the right of way; would be glad to give the right of way free."

(See Transcript, pp. 319-320.)

"Q. Did you in the presence of Mr. Laughlin, at that conference, or at any time, instruct Mr. Boschke to go and constuct that line up in the air as high as he could possibly get, and protect the power site at that point, irrespective of expense?

"A. I did not. I told Mr. Boschke to run lines there and see how high he could go without the cost being prohibitive. Mr. Boschke indicated at that time that the cost would be considerable. He said it was going to cost a great deal of money to get up in the air.

"Q. Did you, or did you not, instruct Mr. Boschke that

Testimony of O'Brien. (Continued.)

no matter what the cost was, he should get the line up in the air?

"A. I did. I said to him that we were interested in the development of cheap power; that anything—while it might cost us considerable money, that any money that was spent might come back to us again.

"Q. I don't believe he quite understands the question. I will ask to have it read. (Question read.)

"A. No, sir, I did not. I thought I answered that a few moments ago. I told him to make survey so as to see how high he could get in the air, how high he could get the line up without the cost being prohibitive.

"There was a resurvey made in response to that instruction. That was made shortly afterwards. I instructed Mr. Boschke to take immediate action on the matter."

(See Transcript, pp. 320-321.)

"Q. In Mr. Laughlin's deposition he has testified to the effect that he indicated to you that you should go up in the air, and that you should pay him whatever sum of money you should damage him wherever the line was constructed.

"A. He had no such arrangement with me, or had no such talk with me. The question of damage was never touched upon. It was simply a question of how far we could get up in order to give him the additional height, in order to develop his power. It was thoroughly understood that the whole question depended, from my standpoint, on the question of how much money we could afford to spend there, without making the line so expensive that we would have to give it up.

"Q. And you did that, did you, to satisfy Mr. Laughlin in connection with your understanding there with him?

"A. I suppose that I had. Mr. Laughlin expressed himself as well pleased with what we had done—the instructions that I had issued to Mr. Boschke, and as I said before, when I asked Mr. Boschke about how high he could get, if he could give an opinion as to how high he could go, or how high he thought he could go, on the data at hand, he

said between *55 and 60 feet,* and Mr. Laughlin seemed to be well pleased with that." Testimony of O'Brien. (Continued.)

(See Transcript, p. 322.)

On cross-examination he said:

"The railroad company was anxious to preserve the power sites along the river, anything that would furnish cheap power. We hope it may be of value to the railroad company."

"Mr. Laughlin stated to me that his interest was in the Interior Development Company, *and that was the basis on which he was negotiating with me,* otherwise I would not have been discussing the matter with him."

(See Transcript, pp. 324-325.)

"The conference with Mr. Laughlin was early in the Spring of 1909. I was under the impression that it was in March or April. I don't think it was later."

(See Transcript, p. 326.)

Mr. Boschke, the chief engineer, also testified to the conversation between Laughlin and O'Brien. He said: Testimony of Boschke.

"I heard the testimony of Mr. O'Brien who preceded me, and recall the conversation which he referred to between himself, Mr. Laughlin, and myself. I cannot say exactly what time it took place. It was in the early part of 1909."

"The line was located at that time on the water grade line along the river. That location had been made some time in 1908."

(See Transcript, p. 327.)

"Q. And what was said, if anything, at that conference with reference to changing the grade?

Testimony of Boschke. (Continued.)

"A. Well, they wanted us to change the grade so as to enable them to build a power site at that point, Sherar's Bridge, and Mr. Laughlin said that anything we could raise the grade there would be of great assistance to him. I had not at that time definite data as to the exact height to which the grade could be raised.

"Q. Did you indicate or had you any information by which you gave any information as to what you thought you could do?

"A. Well, I had the length of the line from the tunnel to the dam site, and our maximum grade was eight-tenths, and from that I formed an approximate idea of how much I could get up, but that was nothing definite at all.

"Q. Did you indicate approximately what that would be?

"A. Well, I think I said something between 45 and 50 feet—perhaps 60; I don't know. We were not definite at all. I saw it was possible to get up on our maximum grade, because the low line grade was much lighter.

"The tunnel is about 3.2 miles from the dam site. The elevation of the line at the tunnel is 661, and the elevation at the dam site is 781. That isn't right at the dam site but 781 is the profile grade at the level where we run levels parallel with the water that would be restrained by the dam. I indicated approximately what elevation we could make at the dam site, at that conference. I knew that we could get up some number of feet and Laughlin said anything we could get up there would be very desirable. I don't remember exactly the height I thought we could make. It was 45 or 50 feet, perhaps 60. I don't remember, but the whole thing hinged on starting up on a maximum grade and getting as high as we could. That is what my instructions were to do.

"Q. Did Mr. Laughlin express satisfaction or dissatisfaction with the approximate height which you indicated?

"A. Well, as I said, at this conference he said that anything that we could get up there would be very desirable and agreeable to them; whatever we could do would be appreciated.

Testimony of Boschke. (Continued.)

"Q. Mr. Laughlin has testified in his deposition that at that conference Mr. O'Brien instructed you to raise that line sufficiently high so as not to interfere with the power development at the Sherar or Interior Development site, irrespective of cost. What is your recollection with reference to that?

"A. No, I did not get any instructions at that conference to do anything more than to investigate it."

(See Transcript, pp. 328-329.)

On cross-examination, Mr. Boschke testified:

"Q. You made an affidavit once in this case, didn't you?

"A. I think so, yes.

"Q. I will read from it; you can follow it if you wish: 'Said B. F. Laughlin was negotiating at said time with the Deschutes Railroad Company, to induce the said Deschutes Railroad Company to raise its line of railway where same should run to such an extent as to permit the construction of a dam at said dam site, 60 feet in height above low water flow of said Deschutes River.' Now, your recollection is now, you didn't say anything like that?

"A. I said we would raise it, as I said before—we could probably get up from 45 to 60 feet.

"Q. That was not what he was asking you to do then?

"A. He said he would be very glad of any height we could get up.

"Q. Now, in your affidavit you say, 'Said negotiations were had, and said request was made of said Laughlin.' You don't remember that he made that request 'must go up 60 feet high'?

"A. Well, it was understood that we could go from 45 to 50 or 60 feet; something of that kind. I never saw him afterwards.

"Q. Now, did you agree at that time that you would go up that high?

"A. No, sir, we did not. We agreed to see what we

Testimony of Boschke. (Continued.)

could go up; we would go up whatever our maximum grade would allow us to go up.

"Q. Did you ever have any interview with Mr. Laughlin except that one time?

"A. I never saw him that I remember of.

"Q. What did he say about the height to which the road should be raised, which would be satisfactory to him?

"A. He said whatever we could get up there would be satisfactory to him.

"Q. Now, in this affidavit you say that he said, 'That if the height of the line of the Deschutes Railroad Company were raised to the height of 60 feet, or raised to a height to permit of a 60-foot dam at this dam site, it would be satisfactory?"

"A. Well, I think he did say that after I said we could probably get up a certain height. He may have said 60 feet, or 55 or 60 feet, whatever we could get up on the maximum grade would be very satisfactory to him.

"Q. In your affidavit you said he said that if you would go up 60 feet, to build a 60-foot dam, it would be satisfactory, didn't you?

"A. Yes, I think very likely it was a fact.

"Q. So he really did say to you, if you would go up to such an elevation as to permit the building of a 60-foot dam at this dam site, it would be satisfactory to him?'

"A. Well, possibly he did, but I couldn't tell him at that day that Mr. Laughlin was making this arrangement at all.

"Q. That is what he said would be satisfactory?

"A. I expect he did.

"Q. He didn't say anything else was satisfactory?

"A. Yes, he did. He said any height would be satisfactory that we could get up to.

"Q. In your affidavit, you didn't say any height, did you?

"A. No, I didn't say that possibly, in there, but that was the fact, just the same."

(See Transcript, pp. 334-336.)

The testimony of the Railroad officers is in conflict with the testimony of Laughlin, who said: Testimony of Laughlin.

"In that conversation Mr. O'Brien said he wanted me to get all the interested people to agree upon a price for a right of way on the river there, and at the same time guaranteed to protect the Sherar property to the fullest extent that it was possible. He called Mr. Boschke in and asked him about how they had run their grade on the river, and he said they had run it right along—a few feet from water. He told Mr. Boschke he would have to go back and re-run the line and save every foot of power for the Sherar property that could be saved. That they had examined the property with their engineer and that they might have to buy it before they got through but to save every foot it was possible to save. Mr. Boschke remonstrated, said he would have to back twelve miles. Well, he told him it didn't make any difference how far he had to go back, he must do it.

"Q. What, if anything, was said in that conversation about compensation for the right of way?

"A. They said they would have to pay the damages and if they had destroyed the property, they would have to buy the property.

"Q. Did Mr. O'Brien say in that interview anything about knowing the value of the property for water power purposes?

"A. He said they had examined it for that purpose.

"Q. What did you say about what should be paid for the property, for right of way over the property for a railroad?

"A. I said I should expect pay according to the amount of damages, whatever the height that the road run. There was no amount stated."

(See Transcript, pp. 518-519.)

"Along, I think, in the fall of 1909, Mr. Morrow of the

Testimony of Laughlin. (Continued.)

Deschutes Railroad Company called me up several times and wanted to get the right of way. I told him that as the matter stood at that time there was a buying privilege out on it and that I could not give him a right of way, and the Sherar's could not give him a right of way, but I thought the Eastern Oregon Land Company would be in shape in a short time so they could deal directly with them upon the title for the right of way. There was no proposition made to me to buy the right of way over the property, nor any sum set or fixed or offered to me for the right of way.

"Q. Was the amount to be paid ever discussed except in this interview with Mr. O'Brien?

"A. None. It wasn't discussed then.

"Q. Mr. Laughlin, what, if anything, did you do so far as giving the Deschutes Railroad Company the right to go and build a railroad over that property?

"A. I didn't give them any.

"Q. Was any application ever made to you for right to go on that property and build a railroad over it?

"A. No; no application more than Mr. Morrow asked me if we could settle the right of way on there and I told him we could not, wasn't in a position to do so.

"I did not know personally whether they re-located the line, as I was not over the ground afterwards. I know it in other ways but I never talked with Mr. O'Brien about it after the time I speak of when he told me he would have it changed. In talking with Mr. Morrow nothing was said about the location having been changed.

"Q. What did you know about their constructing the railroad over that property?

"A. All I know about it is from hearsay. I don't know anything myself, because I have never been on the ground."

(See Transcript, pp. 520-521.)

Testimony of Laughlin. (Continued.)

"I think I had only one direct conversation with Mr. Morrow afterwards. I had one or two over the 'phone. In the conversation I had with Mr. Morrow, the one in November I think, I told him to wait until it was settled by the Eastern Oregon Land Company whether they took it. If they didn't take it, then Mr. Grimes and the Sherar heirs and myself would get together and talk with him, but up until that was done I was not at liberty. Nothing was said about what we would charge for a right of way nor as to what the railroad company would pay. Nothing was said in that conversation in regard to Mr. Morrow having had any interviews with Mr. Martin about the matter. I don't think he had had any interview with Mr. Martin at that time. No mention was made of any conversation which he said he had had with Mr. Martin."

(See Transcript, p. 523.)

While the testimony of Mr. Laughlin pictures a situation more in accordance with the habits and customs of our people than that detailed by Mr. O'Brien and Mr. Boschke, and while the testimony of Mr. Laughlin is not in conflict with any affidavits made some years before and much closer in point of time to the transactions which took place, it is unnecessary to seek to unravel this conflict and ascertain the truth.

The testimony does not show any agreement binding on the plaintiff.

The agreement between Laughlin and the Railroad, whatever its terms may be, was an oral agreement affecting title to real property, and was invalid under the Statute of Frauds.

It is not pretended that this agreement was executed, in whole or in part, at the time Laughlin sold to the

The testimony does not show any agreement binding on the plaintiff. (Continued.)

plaintiff. It is not pretended that plaintiff had any actual or constructive notice or knowledge of the agreement, and it is admitted that the defendant took no step in execution of the agreement till after it knew that plaintiff had acquired Laughlin's interest. Moreover, as the defendant asserts that the work done was done in execution of a subsequent agreement between the Land Company and the defendant, the testimony is as a whole irrelevant.

NEGOTIATIONS BETWEEN SHERAR'S EXECUTORS AND THE RAILROAD COMPANY.

Though the order denying the preliminary injunction is not part of this record, and the affidavits used by the defendant in resisting the motion are not set forth in full, it is quite apparent that the defendant attempted to justify its entry upon and occupation of the property by an agreement entered into between the Sherar executors and the railroad, by which leave to enter upon the property and construct the road was given by Sherar's executors on the condition that the road was so located as to permit the maintenance of a dam 60 feet in height. In support of this contention, Mr. Morrow, the right-of-way agent of the road, testified as follows:

Testimony of Morrow.

"Q. You made an affidavit in this case, did you not?

"A. Yes, I did.

"Q. And in the affidavit which you made in this case, you referred to this conversation between yourself, Mr. O'Brien, and Mr. Laughlin, did you not?

"A. Well, I don't recall, Mr. Minor. If you will read

the affidavit, the affidavit speaks for itself. It is a long time since that affidavit was made.

"Q. Well, I will read this affidavit:

"That in the presence of J. P. O'Brien, G. W. Boschke, B. F. McLaughlin and myself, the said B. F. Laughlin, representing himself as being in possession of an option to purchase the Sherar Estate property, when a general discussion was had with reference to the construction of a line of railroad over the same, said Laughlin urged that the road should be built at as high an elevation as possible; in fact, stating to the remaining three, who were representing the railroad interests, that if they would go as high with the grade as they could, they would be satisfied; when the chief engineer, by reference to his profile and maps, stated that it was possible to reach a height so that a dam sixty feet in height could be constructed, and this was agreed upon the part of Mr. Laughlin to be sufficient.

"Q. Do you remember making an affidavit to that effect?

"A. If those are the words of the affidavit, and I have no reason to doubt them, I made it.

"Q. Then in that conversation it was agreed that the elevation should be sufficient to allow of building a sixty-foot dam?

"A. Well, I don't think so, Mr. Minor. Now, I will tell you about that sixty-foot dam. I am satisfied that Mr. Boschke said that he could reach an elevation—if not positively—I think positively of 60 feet. That is the way I have it in my mind. And the dam site or the dam—I think that I reached that conclusion subsequently, and after the survey was made, and had an understanding that it was possible to construct a dam at the height of 60 feet; but at the conference that I am testifying concerning, I don't believe that that was true. If my affidavit says so, I believe it is erroneous to that extent.

"Q. You may read your affidavit and see whether it doesn't say so.

"A. Oh, I don't question your word for it, Mr. Minor. I don't question your reading of the affidavit.

Testimony of Morrow. (Continued.)

"Q. Then your affidavit, wherein you state that Laughlin agreed that an elevation which would admit of the building of a 60-foot dam was sufficient, is erroneous in that particular, you think?

"A. Well, Mr. Laughlin was satisfied with the discussion had at that time, and, as I say, I am myself satisfied that Mr. Boschke said that he could reach an elevation of 60 feet; and Mr. Laughlin was satisfied with whatever the discussion was. I know that perfectly.

"Q. Well, do you remember whether the question of the height of the dam was discussed or not?

"A. Well, I don't. My recollection of it is just as I have stated it to you.

"Q. This affidavit gave your recollection at the time it was made, didn't it?

"A. Why, yes. Yes, unless—Well, I am sorry that is there, of course, but the phraseology I must not have noticed specially at the time, Mr. Minor.

"Q. This affidavit purports to have been made on the 30th day of April, 1910.

"A. Yes.

"Q. That is about the time it was made, isn't it?

"A. Oh, yes, whenever it is dated there, it was made at that time.

"Q. Well, now, do you think that your recollection now is better than your recollection was at that time?

"A. No, I do not think that it is.

"Q. So you think your recollection at that time was more apt to be right than your recollection now?

"A. Not necessarily more apt to, but equally as reliable at that time as it is now.

"In the interview between me and Mr. Grimes, when we went to Mr. Huntington's office, he reiterated the statement to Mr. Huntington which he had made to me, and it was understood then that we could go ahead and construct our line. I think that I negotiated with these people upon the theory that the elevation to which the road should be built was sufficient to admit of the construction of a 60-foot dam.

Testimony of Morrow. (Continued.)

"Q. Now, Mr. Morrow, in this affidavit you say: 'We then agreed upon a consideration of $1000 to be paid for the right of way through the said Sherar Estate property; and the further agreement and understanding was had that the line of railroad should be built at such a height as to permit of the construction of a sixty-foot dam.'

"A. I think that is right.

"Q. You think that is right?

"A. I think that is right.

"Q. Mr. Grimes insisted and you agreed that the railroad should be built at such an elevation as to admit of the construction of a 60-foot dam?

"A. No, Mr. Grimes never insisted upon any particular height at all; nor did Mr. Huntington. It was simply my statement to them that we could do that, to which they offered no objection, but were satisfied with it.

"Q. But it was agreed that the railroad should be built at an elevation to admit of the building of a 60-foot dam?

"A. I negotiated with them, as I believe, with that understanding.

"In connection with my conversation with Mr. Laughlin, he always said he would be glad to donate the right of way, there is no question about that. I don't recall that he said that in his conversation in July. I think my conversation with Mr. Welch was subsequent to August. I submitted to him the maps and profiles and I presume I said to him—I have no doubt I did say to him, 'I notice that you have an interest in some property up here, and I am negotiating for the rights of way over these lands.' I wanted to know what position he would take in connection with the right of way, and he very agreeably said he would be glad to give us the right of way—no compensation for that; the only thing is that he wanted protection for his power plant. I think I told him that we could build a line there 60 feet, or build a line there that would permit of a 60-foot dam.

"Q. So that, in your conversation with Mr. Welch, you represented that the railroad would be put at such an elevation as to admit of the building of a 60-foot dam?

Testimony of Morrow. (Continued.)

"A. I think I did, yes.

"Q. And that is what he said he would be satisfied with?

"A. Yes, he must have said he would be satisfied with it, because he said he was satisfied that we go ahead and commence the construction of our line.

"Q. But the representation you made was that the line would be built at an elevation to admit of the building of a 60-foot dam?

"A. Yes, I think that is right. *In all our negotiations with any parties interested in that property, the principal point of contention was the height of the dam; the power sites were always interested, in avoiding the possibility of interfering with the construction of the dam, and in all these negotiations, the height was always at a 60-foot level above the low water flow of the Deschutes River according to my understanding of it, and I think that is right.*

"Q. Now, I call your attention to your affidavit, in which I find this language: 'That in the negotiations with each and all, the principal point of contention was the height of a dam, and this height was always at a 60-foot level above the low water flow of the Deschutes River.'

"A. Yes, sir.

"Q. That is correct, is it?

"A. I admit that this is—as I have said, I think that was the basis of my negotiations."

(See Transcript, pp. 358-364.)

This is the very best case that can be made out for the Railroad Company so far as the Sherar lands are concerned. Morrow was the only representative of the Railroad that ever had any transactions with the Sherar executors. The account of these negotiations, given by Mr. Grimes, one of the executors, and Mr. Huntington, counsel for the executors, differs radi-

cally from the account of Mr. Morrow. Mr. Grimes testified as follows: Testimony of Grimes.

"Q. Mr. Morrow states, Mr. Grimes, that in the said negotiations for the purchase of the right of way you stated to him that the principal value of the lands lay in their availability for a power site; that the construction of a line of railroad would enable them to develop this power site, whereas without a railroad it would be practically impossible, and therefore as to the consideration for the right of way, so far as you were concerned you would be glad to donate the right of way in order to secure the construction of a line of railroad, but that in view of the fact that there were many heirs to the estate it would be impossible to satisfy them without a consideration, and that you and he then agreed upon a consideration of one thousand dollars to be paid for the right of way through the Sherar Estate property, and that you further agreed that the line of railroad should be built at such a height as to permit of the construction of a sixty-foot dam. Now what do you remember about anything occurring from which Mr. Morrow made this statement?

"A. I have no recollections of any such talk as that outside of Mr. Huntington's office, which I have just stated there before.

"Q. Was anything said between you and Mr. Morrow when you and he were together alone, outside of Mr. Huntington's office?

"A. In regard to this matter?

"Q. Yes.

"A. I have no recollection of anything being said.

"Q. No conversation of that kind occurred between you two?

"A. No, sir."

(See Transcript, pp. 541-542.)

Testimony of Grimes. (Continued.)

"Q. You didn't have any negotiations at all in regard to a dam site there with the Railroad Company?

"A. Not any more than they were notified, that is in our talk with Mr. Morrow, that if we gave them a right of way through there they would have to keep high enough to protect the dam site.

"Q. How high a dam site would they have to protect there?

"A. I had nothing to do about the figures that the dam site was to be, the height they were to keep. It was supposed to be from sixty to sixty-five feet, my understanding was.

"Q. Wasn't it fifty-five feet you were talking about?

"A. No sir, I don't think so. I never heard of any fifty-five feet.

"Q. What did Mr. Morrow say about keeping up there to protect the dam site?

"A. I have no recollection of his making any reply whatever.

"Q. Who were you representing when you were talking about elevating the road there to go over the dam site?

"A. I understand there was a filing on the dam site there, and of course, the dam site had to be protected.

"I do not know whose filing was on it. I had no filing there and the Sherar Estate had none to my knowledge. I have no recollection about any other talk for right of way with the Deschutes Railroad Company outside of this one with Mr. Morrow."

(See Transcript, pp. 547-548.)

Mr. Huntington's account of the transaction is embraced in a letter written by him to Morrow at the time the transaction took place, for the very purpose of embodying the terms of the transaction in writing. The letter is as follows:

Huntington's letter and testimony.

"August 25th, 1909.

"Mr. J. W. Morrow, c/o O. R. & N. Co., Portland, Oregon.

"Dear Sir:

"Confirming our telephone conversation of this afternoon the executors of the will of J. H. Sherar, deceased, and who also are attorneys in fact for several of the heirs are willing that the Deschutes Railroad Company shall proceed with the construction of its road across the Sherar lands in the Deschutes Canyon, provided the road is constructed sufficiently above the river *as* that it will not interfere with the use of the property for hydraulic purposes, and the persons who have agreed to purchase the property consent. The executors understand that if the persons who have agreed to purchase do not take the property that your company will pay One thousand dollars for the right of way. If the sale is consummated, as we assume it will be, then you are to settle with the purchasers for the right of way.

"Yours very truly,
HUNTINGTON & WILSON."

(See Transcript, p. 175.)

Concerning the writing of this letter, Huntington testified as follows:

"The conversation which led to the writing of that letter, as well as I can remember, was that Mr. Morrow called me to the phone and said that their contractors were very anxious to proceed with the construction work across the Sherar land and wanted to know if I, representing the heirs, would consent to their proceeding. I told him that we were not in position to give our consent; that we had contracted the land to the Eastern Oregon Land Company; that insofar as the heirs themselves were concerned, if the Eastern Oregon Land Company didn't take the land under the option, I thought the heirs would give their consent. Something was said about the price, and I think the price

Huntington's letter and testimony. (Continued.)

had been talked over before between Mr. Morrow and Mr. Grimes. Anyway, I had been advised that the price for the right of way, if the Eastern Oregon Land Company didn't take the land under the option, would be $1000, the company to so construct its road as not to interfere with the development of the water power at that point, and so as not to interfere with the toll roads which were owned by the heirs at that time; there were two toll roads which they crossed. But I told him that he would have to obtain the assent of the Eastern Oregon Land Company, and thereupon wrote him this letter in confirmation of the telephone conversation, which is as follows:"

(See Transcript, p. 174.)

Summary.

It is apparent that in view of this testimony, and there is no other testimony in the record relating to any transaction between the Railroad and Sherar's executors, the Railroad Company has not sustained its case. If the version of Morrow be accepted, the Railroad Company must accept and take its right of way subject to the right of the Land Company to maintain a dam 60 feet in height. If the testimony of the executor and Huntington is accepted, the right of the Railroad Company to maintain its tracks is subject to the condition that the same be constructed so as not to interfere with the development of water power. Whatever view be taken, the Railroad Company has no right to obstruct the construction of a 60-foot dam.

Unangst's Appeal, 55 Pa. St., 128.

THE RIGHT OF THE PLAINTIFF TO OBJECT TO THE LOCATION OF THE ROAD AS THE SAME IS NOW CONSTRUCTED WAS NOT WAIVED BY ANY CONTRACT BETWEEN THE PLAINTIFF AND THE RAILROAD COMPANY.

At the time the transactions between the Railroad Company and the executors of Sherar took place, the Railroad was informed that the Eastern Oregon Land Company was the owner and holder of the option on the Sherar lands. This was on August 25, 1909. No writings ever passed between the plaintiff and the Railroad Company, and the claim that plaintiff assented to the construction of the road over the land rests in the testimony of Morrow. The letter of Huntington to Morrow declared:

> *"If the sale is consummated, as we assume it will be, then you are to settle with the purchasers for the right of way."*

(See Transcript, p. 175.)

Morrow met Martin about the time this letter was written. The meeting was not prearranged; merely a chance meeting in a railroad train. Concerning the conversation which then took place, Morrow testified as follows:

Morrow's testimony and letter.

> "I think I broached this subject to Mr. Martin, and it developed that he was the prospective purchaser; and I outlined to him the agreement that I had reached with the Sherar estate representatives, and that agreement was entirely satisfactory to him. He said that we could go on

Morrow's testimony and letter. (Continued.)

and build the line, and as a matter of fact, when the thousand dollar consideration was mentioned, Mr. Martin wasn't at all interested in that feature of it. I said to him, 'I have agreed to pay the Sherar estate a thousand dollars, and I will do the same thing by you.'

"To that Mr. Martin simply said that it was satisfactory. He was perfectly satisfied to have us go on and construct our line, and he was willing to carry out the agreement that I had had with the Sherar estate people. After the conference with Mr. Martin, I notified the Chief Engineer, Mr. Boschke. I also notified Mr. Huntington that I had seen Mr. Martin, and that he had expressed his willingness."

(See Transcript, pp. 349-350.)

On August 27th, Morrow wrote Huntington, acknowledging the receipt of the letter of August 25th, saying:

"Huntington & Wilson,
Attorneys at Law,
The Dalles, Oregon.

"Gentlemen:

"This will acknowledge receipt of your letter under date of August 25th confirming our conference and understanding over the contention with reference to the construction of our line through the Sherar's estate property, for which I thank you very much. And at the same time I am pleased to advise that I talked this matter over with Mr. Martin of the Eastern Oregon Land Company, who has expressed a willingness to have us go upon the land to construct our line.

"Very truly yours."

(See Transcript, p. 353.)

On cross-examination, Morrow said:

Morrow's testimony and letter. (Continued.)

"I first met Mr. Martin very early in the activities on the Deschutes line. I had negotiations with Mr. Martin for the line down at the mouth of the stream. It is difficult to fix the dates because our preliminaries range from 1906 until we completed the line. The negotiations I had with Mr. Martin were entirely in regard to crossing the lands of the Eastern Oregon Land Company down toward the mouth of the Deschutes River and had nothing to do with the Sherar property. The first talk about the Sherar property was on *August 24th, 1909,* on a trip from Salem to Portland on the train. This was the first and only time I ever opened negotiations with him in regard to the right of way over the Sherar property. The conversation opened up in a general way and during the progress of it I perhaps asked—I wouldn't be surprised but what I asked Mr. Martin directly if he were not the proposed purchaser of the Sherar Estate property. Anyway, learning that he was, I reiterated to him the statement of agreement that I had with the Sherar Estate representatives, to which he consented, and seemed perfectly satisfied with. There was some conversation concerning the cash consideration, and that was an entirely negligible quantity with Mr. Martin. I am inclined to think that he rather objected to taking any money. I said to him that I had agreed with the Sherar Estate to pay that sum; there was no reason why I should not pay it to him, and that I would pay it to him. Anyway, he was perfectly satisfied and said we might go along in the construction of our line. I told him that I had met Mr. Huntington and Mr. Grimes and had agreed to give One Thousand Dollars for the right of way and had their permission to go on with the construction of the line—enter upon the lands and construct the line. While I do not recall it, I must have told him about what had occurred between me and Mr. Grimes about the elevation at which the railroad was to be built. I don't recall positively the conversation that I might have had with him con-

Morrow's testimony and letter. (Continued.)

cerning the height of the dam, and I really don't recall that it was raised at all; but in all probability, when I stated to him the understanding I had with the Sherar people, I also included the fact that we were building at an elevation to admit of the construction of this dam.

"Q. *60-foot dam?*

"A. *Yes, I possibly did.*

"I have an idea that I told Mr. Martin that also. The only writing I ever had with reference to the right of way over the Sherar property, was the letter from Mr. Huntington which has been placed in evidence and which I replied to. I do not recall that I had, and I don't believe I had any correspondence in writing of any kind, or any negotiations in writing of any kind with either Mr. Laughlin or Mr. Martin, or the Eastern Oregon Land Company, or Welch, or Anderson, or the Interior Development Company, or Grimes, or any party representing the Sherar interests."

(See Transcript, pp. 364-366.)

Martin's testimony.

Martin's account of the conversation differs from that of Morrow. In fact, his testimony is in direct conflict with that above quoted. Martin's testimony was as follows:

"The defendant railroad company never made any attempt prior to the bringing of this suit to agree with me or my company for the obtaining of a right of way over this land. No one on behalf of the railroad company ever undertook to negotiate with me for a right of way over the lands that I know of."

(See Transcript, p. 185.)

"Q. Now, do you remember a conversation on the Oregon Electric Line on the 24th day of August, 1909, between yourself and Mr. Morrow?

Martin's testimony. (Continued.)

"A. I do.

"Q. What if anything was said at that time about this project?

"A. Well, I had been down to Salem to see Mr. McCormack about purchasing the Interior Development Company's interest in this property. I met Mr. Morrow on the car by chance, and I don't know how the conversation began unless it was in connection with the Moody site, and I remember that Mr. Morrow said that he thought the Deschutes River was an exceptional opportunity for the development of power and that we had a valuable property there. That if he had gotten the opportunity for a five-minute conversation with Mr. Harriman, he would have bought for the railroad company the Sherar site, which he thought was valuable property. I told him I was very glad to hear he thought so well of it, as we had just concluded the purchase of the property, and he congratulated me on it and said 'I hope that we will have as agreeable a time fixing the right of way over the Sherar site as we had at the mouth of the river.' I said 'I hope we will.' The conversation languished as far as that was concerned.

"Q. Didn't Mr. Morrow say to you at that time he had been to see the Sherar heirs and the Sherar representatives to purchase a right of way over there, and had agreed with them to pay them a thousand dollars in case you didn't take the property, and would be glad to pay you—

"A. I don't recollect it.

"Q. (continuing) and would be glad to pay you that sum of money if it would be satisfactory to you?

"A. He never said that to me."

(See Transcript, pp. 200-201.)

"Q. * * * You testify, Mr. Martin, that you at no time agreed to take a thousand dollars for this right of way over the Sherar property in case you acquired it?

Martin's testimony. (Continued.)

"A. Absolutely; a thousand dollars was never mentioned to me in connection with this property; it would have been a joke."

(See Transcript, p. 202.)

"I heard Mr. Morrow's testimony in regard to the meeting with me on the train between Salem and Portland. I told Mr. Morrow, as well as I can recall, that we had concluded the purchase of the Sherar property.

"MR. WILSON—At the time of this conversation on the Salem car?

"A. Yes. That we were the purchasers. I don't remember the exact words.

"Q. Now, I would like for you to tell the court what Mr. Morrow said to you, if anything, about his agreement wtih the Sherar Estate representatives.

"A. To the best of my recollection, Mr. Morrow didn't tell me of any arrangement that he had made with the executors of the Sherar's Estate.

"Q. Any of the representatives of the estate at all?

"A. Or any of the representatives.

"Q. Did he say anything to you about having any talk with Mr. Grimes or Mr. Huntington in regard to that matter?

"A. He did not, as far as I can recollect.

"Q. He states in his testimony that he outlined this agreement to you, and that you said that the agreement was entirely satisfactory to you. Now, what is the fact in that regard?

"A. Mr. Morrow, to the best of my recollection, did not refer to any arrangement or agreement that he had with the Sherar Estate, or their representatives, and did not outline to me any agreement that he had with them.

"Q. Did you say to him that this agreement was satisfactory to you?

"A. I did not.

"Q. As a matter of fact, Mr. Martin, if he had told you

Martin's testimony. (Continued.)

what he testifies on the stand he did tell you that occurred between himself and the representatives of the Sherar Estate, would that have been satisfactory to you?

"A. It would not.

"Q. Now, do you recollect whether Mr. Morrow ever said anything to you about agreeing to pay $1000?

"A. I never heard of this agreement, as having been passed up to me and being agreed to by me, until the time that the injunction was applied for and I was asked to make an affidavit in response to an affidavit that was made by Mr. Morrow."

(See Transcript, pp. 499-500.)

Summary.

Here, again, the testimony is conflicting, but in view of the existing conditions it is unnecessary to determine whether the recollection of Mr. Martin or that of Mr. Morrow should be accepted.

Morrow declares that he informed Martin of the arrangement made with the Sherar Estate, to which Martin assented. This arrangement, as stated, August 25, 1909, in the letter of Huntington, was conditioned on the provision that the road should be located so as not to interfere with the development of water power, and provided that if the land were purchased by the Land Company, the Railroad Company would settle with the Land Company for the right of way (See Transcript, p. 175). The letter of August 27th, in which Morrow acknowledges receipt of Huntington's letter, accepts this as an accurate statement of the agreement. Indeed, in this very letter, which substantially approves the agreement as stated

Summary. (Continued.)

by Huntington, Morrow states that he has seen Martin, who expressed a willingness that the Railroad go upon the land. According to Morrow's recollection, he believes he also informed Martin of the fact that the road would be constructed at an elevation sufficient to admit of the construction of a 60-foot dam (See Transcript, p. 365). Morrow said:

> "In all our negotiations with any parties interested in that property, the principal point of contention was the height of the dam; the power sites were always interested, in avoiding the possibility of interfering with the construction of the dam, and in all these negotiations, the height was always at a 60-foot level above the low water flow of the Deschutes River according to my understanding of it, and I think that is right."

(See Transcript, p. 363.)

But it is admitted that the road as built does not conform to the agreement with the Sherar executors, either as stated in the Huntington letter or in the testimony of Morrow. Under any circumstances, Martin did not acquiesce in the construction of the road in a manner which would prevent the maintenance of a 60-foot dam. Assuming that plaintiff entered into this agreement, it did not consent to the location of the road where its grade has been built.

THERE IS NO WARRANT FOR THE CLAIM THAT THE LAND COMPANY IS ESTOPPED FROM OBJECTING TO THE LOCATION OF THE ROAD ON THE LINE ON WHICH THE SAME IS CONSTRUCTED.

The basis of this claim of estoppel.

After Huntington received Morrow's letter informing him that Martin had assented to the Railroad entering on the land to construct its road, Huntington promptly wrote to Balfour, Guthrie & Company, the local agents of the Eastern Oregon Land Company, informed them of Morrow's statement and suggested that he be disabused of the impression existing in his mind if it were in fact erroneous. This letter was never forwarded to the Land Company, and though Balfour, Guthrie & Company, agents of the Land Company, knew of the claim of the Railroad early in September, they paid no attention to it.

If Morrow put forth in good faith the claim asserted in the letter to Huntington, and the Land Company was apprised thereof, it is apparent that the Land Company should have corrected the impression under which he labored. Balfour, Guthrie & Company seem to have regarded the claim as preposterous and paid no attention to it. They neither notified the Land Company of the assertion of the claim or the Railroad Company of Morrow's mistake (Tr., fols. 502-3).

The learned Judge of the District Court seems to have been of the opinion that no agreement was ever made between Martin and Morrow. Indeed, in

The basis of this claim of estoppel. (Continued.)

neither the first nor the second opinion is the existence of such an agreement recognized. The Judge was of the opinion that under these circumstances the failure of the Land Company to inform the Railroad Company that no agreement existed, estopped the Land Company from denying the existence of the agreement after the Railroad Company acted.

(See Transcript, p. 117.)

It is unnecessary to determine whether or not the failure of the Land Company to notify the Railroad of the fact that it did not acquiesce in the agreement between the Sherar Executors and Morrow could have been a basis on which an estoppel could arise.

The limit of the estoppel asserted.

Under no circumstances would such estoppel go further than make binding upon the Land Company the agreement under which the Railroad claimed to act.

If an estoppel arose against the Land Company it merely prevented that company from objecting to the execution of the agreement with the Sherar Executors which formed the basic warrant for the entry by the Railroad upon the land then in the possession of the Sherars.

The failure of the Land Company to notify the Railroad Company that it objected to the entry of the Railroad Company upon the property could not be considered as inducing or justifying the Railroad Company in doing any act or thing not authorized

The limit of the estoppel asserted. (Continued.)

by the agreement between the Sherar Executors and the Railroad.

But the Railroad Company did not construct its road in accordance with this agreement. Whether the Sherar contract be regarded as embodied in full in the Huntington letter, or whether the agreement of the parties specified that the road should be constructed so as to permit the erection of a dam 60 feet high as testified to by Morrow, is immaterial. The Railroad Company has not complied with the contract under either view.

Certain admitted facts.

If it be conceded that the provisions of the contract concerning the entry of the Railroad Company upon the Sherar lands, and the construction of the road, are binding upon the plaintiff, either by virtue of an estoppel or by reason of the plaintiff giving express sanction to the agreement as Morrow declared, it is the admitted fact that the road as constructed does interfere with the use of the property for hydraulic purposes, while the contract declared,

> "* * * that the Deschutes Railroad Company shall proceed with the construction of its road across the Sherar lands in the Deschutes Canyon, provided the road is constructed sufficiently above the river *as* that it will not interfere with the use of the property for hydraulic purposes, and the persons who have agreed to purchase the property consent."

(See Transcript, p. 175.)

Certain admitted facts. (Continued.)

According to the testimony of Morrow, it was agreed that the point at which the road should be constructed so as not to interfere with the power development, was a point sufficiently high to permit the construction and maintenance of a 60-foot dam, Morrow saying:

> "In all our negotiations with any parties interested in that property, the principal point of contention was the height of the dam; the power sites were always interested, in avoiding the possibility of interfering with the construction of the dam, *and in all these negotiations the height was always at a 60-foot level above the low water flow of the Deschutes River according to my understanding of it, and I think that is right.*"

(See Transcript, p. 363.)

So, according to the testimony of Morrow, the defendant was not and could not at any time have been led to believe either by reason of contract or estoppel, that the plaintiff or any other person consented to the construction of the road unless the location was such as to permit the maintenance of a dam 60 feet high. But it is admitted that the maintenance of a dam 60 feet high will, in times of high water, result in damage to the road as located, and the decree in this case enjoins plaintiff from maintaining a dam which would flood or damage defendant's railroad.

This decree is not justified by any contract or agreement between any parties, and the result is to take the property of plaintiff without compensation, for none is awarded.

The lower court was, however, of the opinion that the plaintiff was estopped from asserting that the road was not located in accordance with the contract. Concerning this, the court, in its first opinion, said:

Opinion of Judge Bean.

> "It thus appears that notwithstanding complainant had knowledge of defendant's possession, the claims under which it was proceeding, the actual location of its line and the work being done thereon, it allowed the work to proceed without objection until after defendant had expended large sums of money relying on its agreement or supposed agreement with the interested parties, including the complainant.
>
> "I am therefore inclined to the opinion that under such circumstances the complainant cannot be heard to say that the road was located and constructed at the place where it was actually built without its consent."

(See Transcript, p. 119.)

This is the crux of the opinion, and the statements of fact on which it is based are without any support whatever in the evidence. On the contrary, the evidence shows that no estoppel of any kind arose.

The evidence shows no estoppel.

In September or October, 1909, the Land Company ascertained that the Railroad Company intended to build across the land. Whistler, Chief Engineer of the Land Company, called on Boschke, Chief Engineer of the Railroad Company, to ascertain the location of the road. The following testimony shows what took place at that interview. On his direct examination, Boschke said:

Testimony of Boschke.

> "I saw more or less of Mr. Whistler along the river there. He called on my office for information as to the

Testimony of Boschke. (Continued.)

height of the line, etc. He, as I understood it, was representing Mr. Martin's interests. In calling at my office, he wanted maps and profiles of the railroad located line. I furnished these to him in October, I think it was October, the latter part of October, 1909. The profile referred to by Mr. Whistler in his letter of October 6, 1909, to Balfour, Guthrie & Company, as having been furnished by my office, is a profile of the line for several miles on each side of the dam, and showed the location of the line as indicated on Plaintiff's Exhibit 31. I offered to give Mr. Whistler all the information I had, as indicated in his letter to Balfour, Guthrie & Company. With reference to the statement in Mr. Whistler's letter to Balfour, Guthrie, that the profile did not show the elevation above water surface of river, I should think it would be a very proper thing for him to go there. He had where our line was. It was staked out on the ground, and he could find the river there.

"Q. When you said you thought it was about 70 feet, did you purport to give him any accurate information?

"A. No, sir.

"Q. Did you advise him that you had any such information?

"A. No, I don't recall that, because we didn't take—in running our survey, we didn't take the bed of the river, you know. We had a high water and low water on the low line, and it could have been arrived at. He had ample information. By going on the ground, he could very readily determine.

"Q. Did you attempt to deceive him?

"A. None whatever, no sir."

(See Transcript, pp. 330-331.)

"Q. Did Mr. Whistler ever make any objection to you that your line wasn't high enough for the purposes for which his client wanted to use the property there?

"A. He spoke of the upper end, the way our grade lay, where the water came down, coming down the natural

grade of the river, would reach the water backed up from the dam; it would probably flood our grade in there. I said to him, that part of it, we would readily change that when the time came; when he had a dam three, but I did not believe in spending any money to change that at this time." *Testimony of Boschke. (Continued.)*

(See Transcript, p. 333.)

On cross-examination, he said:

"When I gave Mr. Whistler the profile, which seemingly was on the 29th of October, I may have discussed the height at which the grade was being constructed, and I may have informed Mr. Whistler that the road was being constructed at a height sufficient to permit the construction of a dam at the dam site of the Interior Development Company, 60 feet in height. I must have done it if it is in that affidavit; I probably did.

"Q. In your affidavit you say this: 'On October 29, 1909, I delivered to Mr. John T. Whistler maps and profile of the line of the said Deschutes Railroad Company as amended, to comply with the undertaking and agreement had with said B. F. Laughlin, and showing the elevation at which said line was then being constructed, and work on it had been prosecuted for approximately two mnoths, and discussed with said John T. Whistler the height at which said grade was being constructed, and informed the said Whistler that the same was of a height sufficient to permit the construction of a dam at the site known as the Interior Development dam site above referred to, of 60 feet in height."

(See Transcript, pp. 339-340.)

Testimony of Boschke.

It is this testimony of Boschke on which the claim of estoppel rests, and this testimony must be viewed

Testimony of Boschke. (Continued.)

in connection with the following testimony of that witness:

"Q. You made an affidavit once in this case, didn't you?

"A. I think so, yes.

"Q. I will read from it; you can follow it if you wish: 'Said B. F. Laughlin was negotiating at said time with the Deschutes Railroad Company, to induce the said Deschutes Railroad Company to raise its line of railway where same should run to such an extent as to permit the construction of a dam at said dam site, 60 feet in height above low water flow of said Deschutes River.' Now, your recollection is now, you didn't say anything like that?

"A. I said we would raise it, as I said before—we could probably get up from 45 to 60 feet.

"Q. That was not what he was asking you to do then?

"A. He said he would be very glad of any height we could get up.

"Q. Now, in your affidavit you say, 'Said negotiations were had, and said request was made of said Laughlin.' You don't remember that he made that request 'must go up 60 feet high'?

"A. Well, it was understood that we could go from 45 to 50 or 60 feet; something of that kind. I never saw him afterwards.

"Q. Now, did you agree at that time that you would go up that high?

"A. No, sir, we did not. We agreed to see what we could go up; we would go up whatever our maximum grade would allow us to go up.

"Q. Did you ever have any interview with Mr. Laughlin except that one time?

"A. I never saw him that I remember of.

"Q. What did he say about the height to which the road should be raised, which would be satisfactory to him?

"A. He said whatever we could get up there would be satisfactory to him.

"Q. Now, in this affidavit you say that he said, 'That

Testimony of Boschke. (Continued.)

if the height of the line of the Deschutes Railroad Company were raised to the height of 60 feet, or raised to a height to permit of a 60-foot dam at this dam site, it would be satisfactory'?

"A. Well, I think he did say that after I said we could probably get up a certain height. He may have said 60 feet, or 55 or 60 feet, whatever we could get up on the maximum grade would be very satisfactory to him.

"Q. In your affidavit you said he said that if you would go up 60 feet, to build a 60-foot dam, it would be satisfactory, didn't you?

"A. Yes, I think very likely it was a fact.

"Q. So he really did say to you, if you would go up to such an elevation as to permit the building of a 60-foot dam at this dam site, it would be satisfactory to him?

"A. Well, possibly he did, but I couldn't tell him at that day that Mr. Laughlin was making this arrangement at all.

"Q. That is what he said would be satisfactory?

"A. I expect he did.

"Q. He didn't say anything else was satisfactory?

"A. Yes, he did. He said any height would be satisfactory that we could get up to.

"Q. In your affidavit, you didn't say any height, did you?

"A. No, I didn't say that possibly, in there, but that was the fact, just the same."

(See Transcript, pp. 334-336.)

"Q. *How high a dam did you calculate could be built at the dam site without interfering with your road?*

"A. *I wasn't making any figures on the dam site at all, or the dam. I was building a railroad there, and building it as high as Icould get up, starting at eight-tenths grade at the tunnel.*

"I think a dam readily could be built there 60 feet or over without flooding our track or right of way so as to

Testimony of Boschke. (Continued.)

interfere with our railroad, if the flood waters were properly taken care of.

"Q. *Why weren't you building your road so as to guard against flood waters?*

"A. *As I said before, my object was to build a railroad there, and I was ordered to build it as high as I could, going up the maximum grade from the tunnel, and there wasn't any dam built there at that time, and there isn't to-day. In my opinion, though, a dam could be built there 60 feet, and probably would be all right, except might flood our slopes, and in that way soften them up and injure the railroad, where the slopes run down into the river.*"

(See Transcript, p. 339.)

"There was nothing said at the conference between me and Mr. Whistler in regard to the elevation of our road at the dam site. We do not reach our maximum height until we get two or three hundred feet south of the dam site.

"Q. Then how did you expect to protect your railroad at the dam site?

"A. Well, I don't—levees or something of that kind. I think there are some cuts in there; build a retaining wall or something like that. It is only a matter of a couple of feet there. It wouldn't be a hard job to keep out two feet of water. I don't recall that being discussed with Mr. Whistler. He had all the information. He had where our line was to be, and the bottom of the river was there on the ground, and he could easily tell what relation they bore to each other."

(See Transcript, pp 342-343.)

Whistler made a report to the Land Company in which he advised them of the fact that he was unable to obtain information sufficient to enable him to determine whether the line was so located that the main-

tenance of a 60-foot dam would not interfere with its operation, as the maps of the railroad did not show the line of low water and it would be necessary to examine the ground to ascertain.

Apparently Boschke told him that the road would not change its grade anyway, for in his report he said:

Whistler's report.

> "The profile handed me does not show elevation above water surface of river at proposed dam site, but Mr. Boschke states from what information he has in his office, that he believes the location is about 70 feet above water surface at dam site. Our levels in conjunction with the elevations shown on profile would indicate that their location is only about 60 feet above water surface, but it is not certain which datum the bench mark from which our levels run refers, and I doubt if absolute assurance can be gotten without sending a man to the site to determine.
>
> *"In either case, however, I am reasonably certain the railroad company would object seriously to raising their location.* An 0.8% grade was used by the company in climbing over the U. S. Reclamation Service's dam site, and this has been adopted as their maximum grade. From their profile, it appears they have used this to climb over the Sherar site, and to go higher would require them to change their location, not only throughout the entire climb, but as much farther north as necessary to obtain the increased elevation by length of line."

(See Transcript, pp. 228-229.)

White & Co.'s report.

When this report of Whistler's was received, J. G. White & Company were employed to report on the question. Whistler also went back to obtain further information from the railroad company, and was informed by them on October 29th that the road would

be seventy feet above low water (Tr., pp. 339-340). As soon as White & Company made their report, it appeared that the grade was not high enough to permit the maintenance of a 60-foot dam. Concerning this report, Martin said:

Martin's testimony.

"Q. And you never made any objection to the company on account of the method in which they were constructing their line, on account of any information that was furnished you or otherwise?

"A. I did.

"Q. At what time?

"A. I came up here as soon as I received the J. G. White report and I went to see Mr. Morrow, and I told him what was contained in this J. G. White report.

"The preliminary J. G. White report was made on March 3rd, 1910.

"Q. And that was five months after the line had been constructed across that property?

"A. Well, I can't help that; you asked me when we objected. I objected as soon as I had information on which to base an objection.

"Q. You never objected to any work of the Deschutes Railroad Company at that point by virtue of Mr. Whistler's employment, did you?

"A. He states that the water level is not known to Mr. Boschke and that he can't form a definite estimate as to where the railroad is with regard to the water.

"Q. That is generally correct.

"A. I couldn't do any better.

"Q. He also said Mr. Boschke furnished him with profile, showing the height of the line, did he not?

"A. It doesn't show the water level.

"Q. Doesn't show the water line but does show the height of the railroad grade, doesn't it?

"A. I am not an engineer, but I suppose you have to know what the height above a given point is to know what the difference is.

"Q. But Mr. Whistler could ascertain the datum from which that was taken, could he not?

"A. He asked for it, and he said in his report Mr. Boschke didn't know.

"Q. He said he didn't know the level of the water; isn't that correct?

"A. That is the very controlling feature. That is exactly the whole essence of the thing. If he doesn't know the water level, what indication would it be as to the height the railroad was going?

"The height of the railroad is not shown here because the water level is not shown.

"Q. But then this profile, all these profiles are made from definite datum, aren't they—basing point?

"A. At sea level, I assume.

"Q. And isn't it an easy enough matter to ascertain the elevation which the water is above sea level?

"A. If we ran out and took the elevation at that point. I don't suppose that was up to us, was it?

"Q. Isn't that a part of Mr. Whistler's duty? Isn't he doing it every day throughout this construction work of his?

"A. Oh, I doubt that; he wasn't constructing the Deschutes Railroad. Right here, between the two engineering companies, the Oregon Trunk on one side and your own engineers on the other, there is a difference in datum. I have forgotten whether seven or eight, or twenty-seven or twenty-eight feet.

"Q. In any event you never made any objection?

"A. We were informed by Mr. Whistler that Mr. Boschke had given him a profile; he examined that; it didn't have water level on it, and he couldn't tell if the railroad at that point was 60 or 70 feet above mean low water, or what the elevation was.

"I don't recollect whether Mr. Whistler stated he had been on the ground or not. He may have. I don't think he was. I think he examined what Mr. Boschke gave him here.

"Q. But in any event you never made any objection to

Martin's testimony. (Continued.)

the construction of this line until after you received the report of J. G. White & Company in March, 1910?

"A. I didn't make any objection to the railroad construction until I had a basis for knowing what I was talking about.

"I don't think the railroad company ever refused to give us any information they had about the construction of the line, or to our employees."

(See Transcript, pp. 197-199.)

We respectfully submit, in view of these facts, that under settled principles of law, no estoppel arose.

Summary.

The evidence shows quite clearly that when the Railroad Company commenced to construct its line it determined to adopt a grade of 0.8 per cent. and no more. This grade commenced at the tunnel. The profile map of the Railroad Company did not show whether this grade would permit the maintenance of a 60-foot dam, for the map did not give the water level. Accordingly, when Whistler called on Boschke and procured the map he was still unable to ascertain what the result would be. He asked Boschke what the elevation would be and was informed by Boschke that the elevation would be 70 feet. Whistler was doubtful of the accuracy of the statement but could not ascertain the fact without sending a man to the ground (Tr., p. 333). He also gathered the impression that the Railroad would not change its alignment under any circumstances. All this he sets forth in his letter of October 6, 1909, to Balfour, Guthrie & Company. On October 29th he again called on

Boschke and was shown another map, which gave no water level, but was assured that the line of the road was high enough to permit the construction of a 60-foot dam. He called attention to the necessity of a high grade at the point where the moving body of the stream entered the water of the reservoir, and emphasized the necessity of providing for a 60-foot dam (Tr., p. 333). Whistler testified that he never approved the line adopted (Tr., p. 570), and Boschke does not assert he did. In the first opinion of the lower court it is held that the failure of the plaintiff to send a man to the ground to check the figures of the Chief Engineer of the Railroad and ascertain whether the grade adopted was sufficient to comply with the contract affords the basis for an estoppel.

Summary. (Continued.)

The conclusion of the District Court.

This is clearly erroneous. Obviously, the conduct of the Land Company evidences no intent to waive or abandon the right to a 60-foot dam; indeed, Boschke asserts no such impression. The duty of adopting a sufficient grade was cast upon the Railroad Company by the contract under which it was permitted to go on the land.

Error in the view adopted by the District Court.

In *Unangst's Appeal,* 55 Pa. St., 128, the Supreme Court of Pennsylvania had before it a case strikingly similar to the case at bar. The facts are stated in the opinion, which is as follows:

Authorities on the question of estoppel.

> "This is a bill in equity to restrain the defendants from proceeding to construct a railroad upon the farm of the plaintiff. The plaintiff alleges they have entered and are unlawfully constructing their railroad without his consent

Unangst's Appeal.

Unangst's Appeal. (Continued.)

and without payment of a compensation or giving him security therefor; and that their acts, if persisted in, will do him great and essential injury. The answer of the defendant justifies under an alleged agreement to permit them to enter and construct their railroad, provided they would do so on the west side of the brick house near Bethlehem, against the hillside, and high enough to save his water-power, which the answer alleges he estimated at eight feet above low-water mark; and avers that they accepted this condition, and have proceeded to perform the same, and are constructing the road high enough to save complainant's water-power, to wit, eight feet high above low-water mark. Thus the height of the grade, to avoid injury to the water-power, is an admitted condition of the right to enter and construct, but the height is alleged to have been estimated at a given number of feet.

"The defendants called two witnesses to prove the alleged license, both of whom were stockholders who had assigned their stock for the purpose of being witnesses, one to his wife, and the other to his son, a portion of his subscription being yet unpaid. They were objected to, and were of doubtful competency; but it is unnecessray to decide this question. According to the testimony of one, the plaintiff said to Mr. Brodhead, the president of the company, in a conversation about changing the route of the survey, 'If you go down there on the other side of the brick house—west side—and do my house no harm, and on this side do my water-power no damage, then go on. I have quarried stone for a mill and still-house, and if you stay up there on the west side between me and Kemmerer, just go on and make the railway. I will ask nothing.' The other witness says, 'Mr. Unangst then told Mr. Brodhead that if they would change it (the route) to bring the road high enough not to interfere with his water-power, they should just go on with the road; that if they stayed up high enough he would not charge much or anything.' Neither of these witnesses—and they are the only witnesses of the alleged consent—testifies to any

estimate being made by the plaintiff of the height of the grade necessary to save his water-power.

"The defendants gave no proof whatever that the road was being built high enough to avoid injury to the water-power. The proof of both of these facts, the estimate of height alleged, and that the height in fact did no injury, lay on the defendants: *Purdy* v. *Wright,* 7 Casey, 387. Thus both answer and proof concede that the express condition of the right to enter and construct before compensation or security rests on making the grade high enough to avoid injury to the water-power, while no proof of a sufficient height was given by the defendants. But the plaintiff proved expressly by two witnesses, one of whom was an engineer who had levelled the height of the water and of the grade of the road, that the water in the stream could not be dammed up to the water-level of the old dam at the forebay without submerging the railroad from five to six feet.

"The master decided the case, on the fact that the railroad was located and being constructed on the west side of the brick house, substantially on the route indicated by the plaintiff in his conversation with Brodhead.

"But he does not find the fact, or notice in his argument, that the grade was high enough not to injure or interfere with the plaintiff's water-power. He argues that defendants having a legal right of entry, and the plaintiff having consented to their entry and construction of the road at the place designated by him, he waived his right to compensation or security before entry; and, if entitled to damages at all, he must seek compensation in the mode pointed out by the charter. His argument, however, overlooks the fact that the legal right of entry is subject, by the amended constitution, to the condition of compensation or security before it can be exercised; and that the alleged waiver was made upon a fundamental condition involving this very right of compensation, by preventing the injury which would call most loudly for it.

Unangst's Appeal. (Continued.)

The condition of waiver was of prime importance to the plaintiff.

"He saw a line of the road surveyed which would ruin his water-power, and he said to the president, 'Change your route and go over there and raise up your road high enough to do my water-power no injury, and I will ask no damages or not much.'

"The object of his consent was to save his water-power —going over to the hillside was but a means to that end. To ruin his water-power was to do him irreparable and serious injury.

"To save it was to render the injury almost inappreciable. It needs no argument to show that to violate this feature of the agreement, was to ignore the fundamental condition that procured his assent to the entry and construction of the road without compensation or security first made.

"Yet the master either overlooked, or attached so little importance to this fact, that he did not even mention it. But he concedes the principle in his argument. He says it is urged that the landowner is not remediless because of his consent to an entry on his land for railroad construction. Certainly not (he replies), if there be a plain and palpable violation of the privileges granted; as a right to cross one end of a farm does not justify entry and construction across the middle. But (he proceeds to say) when the road is laid out and constructed nearly or quite upon the designated route, the complainant cannot claim an injunction against the necessary consequences of such construction. But this is the very mistake. Destruction of the water-power is not the consequence of construction upon the designated route, but of construction in violation of the designated grade, to wit, an elevation sufficient to save the water-power. A deviation from the route he concedes to be a violation of the condition of consent; but deviation from grade, which is the all-important matter, he seems not to have thought of.

"The route was prescribed for the very purpose of

raising the grade and of reaching the level necessary to preserve the power. It was the single thought of the plaintiff, and he stated that he hauled the stones and was going to build a new mill and a distillery. In his short conversation he was distinct in his utterance, that if the route was changed to 'bring the road high enough not to interfere with his water-power, they should just go on with the road.' It then became the duty of the company to examine the designated route to ascertain whether it would suit their purpose, and carry the road up to the required elevation without too much expense. If it did not suit their alignment, or if it would require too great a fill to reach the proper elevation, they need not go on under this license, and had it in their power to enter and construct the line to suit themselves, by giving the security or making the compensation necessary to entitle them to proceed.

"It is insisted by the plaintiff that the license was not binding, it being neither expressly accepted nor reduced to writing. It is unnecessary to decide these questions, but they lead to some comments upon the facts. According to the defendants' two witnesses, not a word was said by Brodhead in reply to the plaintiff. He neither said he would accept the terms nor promised to fulfill the condition. The master rests this part of the case wholly upon the subsequent change in the line, and the proceeding to construct on the indicated route. But the conduct of Brodhead required notice. Though he had said nothing in answer to the plaintiff, he followed Herman, the witness who had gone forward, called him to stop and said: 'Have you noticed the words this man spoke?' Herman said yes, and Brodhead said no more. This evidently looks more like a catching bargain than a fair and open effort to obtain the plaintiff's consent. The absence of a writing under these circumstances, and of any assurance on the part of Brodhead to observe the condition, does not look well. When a railroad company asks to divest a citizen of rights sacredly guarded by the con-

Unangst's Appeal. (Continued.)

stitution, it is the least it can do to come into court, if not with a writing, with full, distinct and unequivocal proof of the waiver it alleges. The only question remaining is, whether equity will interfere to prevent the injury. Of this I cannot doubt. After the construction of the road the plaintiff cannot build up his dam, for this would submerge the road five or six feet, and make it impassable. He would then have to put up with uncertain damages, and the risk of collection, as well as its difficulties and delays. He is not bound to yield his undoubted right to previous compensation or good security, and it would be most inequitable to force him into this position.

"A corporation obtaining a concession to enter on condition of refraining from a particular injury, in its nature irreparable, and which cannot be readily estimated in damages, forfeits its license when it violates this condition, and should be restrained until it does equity. It comes under that head of equity power which extends to the prevention or *restraint* of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community, or the rights of individuals. The act in this instance, if continued to be done, is in its effect upon the rights of the plaintiff of the same nature as waste. Even a tenant without impeachment of waste will be restrained from doing unnecessary and injurious waste: 3 *Daniels Chan. Pr.* (1865), pp. 1737-38. . . ."

Unangst's Appeal, 55 Pa. St., 128, pp. 135-138.

The decision in this case is directly applicable to the case at bar. In view of the evidence, the estoppel asserted must rest upon the failure of the Land Company to act under the conditions outlined, not upon any misrepresentation. But as

a matter of law and of fact the Land Company was not called upon to act. *It did not know that the grade adopted was insufficient and could not ascertain that fact without employing engineers to do the very work the Railroad Company had assumed the obligation of doing. There were no facts known to the Land Company and not known to the Railroad Company. The means of knowledge of the Railroad Company were just as great as those of the Land Company.* Under these circumstances the first essential element of an estoppel is lacking.

Crary v. Dye.

In *Crary* v. *Dye,* 208 U. S., 515, at 521, the court said:

> "The principle of estoppel is well settled. It precludes a person from denying what he has said or the implication from his silence or conduct upon which another has acted. There must, however, be some intended deception in the conduct or declarations, or such gross negligence as to amount to constructive fraud. *Brant* v. *Virginia Coal & Iron Co.,* 93 U. S., 326; *Hobbs* v. *McLean,* 117 U. S., 567. And in respect to the title of real property the party claiming to have been influenced by the conduct or declarations must have not only been destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. *Brant* v. *Virginia Coal & Iron Co., supra.* These principles are expressed and illustrated by cases in the various text books upon equitable rights and remedies. Does the conduct relied upon in the case at bar satisfy these principles?"

Tustin v. Reading Company.

In *Tustin* v. *Philadelphia & Reading Coal & Iron Co.* (95 Atl., 595, 9), the Supreme Court of Pennsylvania said:

> "The facts of the case do not disclose the elements of an estoppel. An estoppel can be claimed only by one who has acted in ignorance of the true state of facts (*Hill* v. *Epley*, 31 Pa., 331; *Woods* v. *Wilson*, 37 Pa., 379), *and who was without suitable means of informing himself of their existence* (*Cuttle* v. *Brockway*, 32 Pa., 45). If he had notice of the facts, and was not misled to his disadvantage, there can be no estoppel. (*Duquesne Bank's Appeal*, 74 Pa., 426; *Wright's Appeal*, 99 Pa., 425). Silence becomes a fraud, and works an estoppel, only when a party withholds information which the other party does not have, or does not possess the means of obtaining, and which he should have to protect his rights. *Where both parties know the facts, or have equal means of knowledge of the facts, the silence of either in regard to them is not a fraud upon the other party. Rhawn* v. *Edge Hill Furnace Co.*, 201 Pa., 637; 51 Atl., 360.
>
> "There is no evidence in the case that the defendant was prejudiced or misled to its injury by the conduct of, or alleged interpretation of the lease by Mr. Wolverton or the beneficially interested parties. The lessee acted with a full knowledge of all the facts."

Hawley v. Florsheim.

In *Hawley* v. *Florsheim* (44 Ill. App., 321, 5), the court said:

> "A party contracting to construct a party-wall, or to do work of any kind, assumes to be possessed of the skill necessary to enable him to perform his contract, and he must be presumed to know and understand the terms of his agreement; if he fails to fulfill his undertaking, if in violation of his promise he does his work in a negligent and improper manner, it is not a sufficient excuse, and will not relieve him

from responsibility, that the owner, knowing of the improper work when it was going on, failed to remonstrate and object. *Davidson* v. *Young*, 38 Ill., 145, 152; *Bigelow on Estoppel*, 662, 670; *Dinet* v. *Eilert*, 13 Ill. App., 99.

Hawley v. Florsheim. (Continued.)

"The doctrine of estoppel *in pais* is based upon a party being misled by conduct upon which he had a right to rely; but a party having contracted to do good work, has no right to rely upon the owner's failure to object to poor."

In *C. H. Rugg Co.* v. *Ormrod* (198 N. Y., 119; 91 N. E., 368), the Court of Appeals said:

Rugg v. Ormrod.

". . . An estoppel resting wholly upon equity cannot be used to shift a loss from one careless person to another when the loss could not have happened without the earlier negligence of the plaintiff, and the later negligence of the defendant, at the most, only contributed to the result."

But even if the conduct of the plaintiff has been such as to afford a basis for an estoppel had the defendant acted in reliance thereon, the evidence shows that the action of the defendant was in no way influenced by the acts or omissions of the plaintiff.

The Railroad Company was not misled by the conduct of the plaintiff.

The Railroad Company took no measurements to ascertain the location of the water level till April 3, 1910, after this action was commenced (Tr., p. 381). But on October 29th Boschke states that he informed Whistler that the line would be high enough to permit the maintenance of a 60-foot dam. He says:

Testimony of Boschke.

"Q. In your affidavit you say this: 'On October 29, 1909, I delivered to Mr. John T. Whistler maps and profile of the line of the said Deschutes Railroad Company as amended, to comply with the undertaking and agreement had with said B. F. Laughlin, and showing the elevation at

Testimony of Boschke. (Continued.)

which said line was then being constructed, and work on it had been prosecuted for approximately two months, and discussed with said John T. Whistler the height at which said grade was being constructed, and informed the said Whistler that the same was of a height sufficient to permit the construction of a dam at the site known as the Interior Development dam site above referred to, of 60 feet in height.

"A. Well, I think that is right too."

(See Transcript, p. 340.)

Here are representations forming a basis for estoppel against the Railroad Company, not in its favor.

But apart from this Boschke says:

"Q. *How high a dam did you calculate could be built at the dam site without interfering with your road?*

"A. *I wasn't making any figures on the dam site at all, or the dam. I was building a railroad there, and building it as high as I could get up, starting at eight-tenths grade at the tunnel.*

"*I think a dam readily could be built there 60 feet or over without flooding our track or right of way so as to interfere with our railroad, if the flood waters were properly taken care of.*

"Q. *Why weren't you building your road so as to guard against flood waters?*

"A. *As I said before, my object was to build a railroad there, and I was ordered to build it as high as I could, going up the maximum grade from the tunnel, and there wasn't any dam built there at that time, and there isn't today. In my opinion, though, a dam could be built there 60 feet, and probably would be all right, except might flood our slopes, and in that way soften them up and injure the railroad, where the slopes run down into the river.*"

(See Transcript, p. 339.)

Testimony of Boschke. (Continued.)

From this testimony it is perfectly obvious that the Railroad Company did not act in any particular on any assumption drawn from the conduct of the Land Company. It did what railroads usually do after taking possession, it built just as it desired and intended to build, disregarding to such extent as it desired all contract obligations.

In *Wiser* v. *Lawler* (189 U. S., 260, 70), the Supreme Court said:

> "Putting the case in the most favorable light for the plaintiffs, it was only a case of estoppel by silence. Indeed, it was not even an ordinary case of estoppel by silence, but an estoppel by silence concerning facts of which defendants may have had no actual knowledge. To constitute an estoppel by silence there must be something more than an opportunity to speak. There must be an obligation. This principle applies with peculiar force where the persons to whom notice should be given are unknown. So, too, to constitute an estoppel, either by express representation or by silence, there must not only be a duty to speak, but the purchase must have been made in reliance upon the conduct of the party sought to be estopped. . . ."

Wiser v. Lawler.

In *Willmott* v. *Barber* (15 L. R. Ch. Div., 105), Fry, J., said:

> ". . . It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must

ser v. Lawler
ntinued.)

have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

It is elementary that no estoppel exists unless the person asserting the estoppel has changed his position in reliance on the act on which the estoppel is based. See

Ewart on Estoppel, p. 131;
Bigelow on Estoppel, p. 638.

The following decisions of the Supreme Court of the State of Oregon show quite clearly that under the law of that State it was not incumbent on the plaintiff to supervise the defendant in the performance of the work authorized, and that the failure of the plaintiff to ascertain and point out the particulars in which the work did not conform to the authority given,

created no estoppel. Indeed, the cases hold that no estoppel will arise even where the land owner has actual knowledge of the fact that the work done is not authorized, and fails to protest.

Falls City Lumber Co. v. *Watkins,* 53 Ore., 215; 99 Pac., 884;
Lavery v. *Arnold, Estoppel,* 36 Ore., 84; 57 Pac., 906;
Miser v. *O'Shea,* 37 Ore., 231; 62 Pac., 491;
Ewing v. *Rhea,* 37 Ore., 583; 62 Pac., 790;
Brown v. *Mining Co.,* 48 Ore., 277; 86 Pac., 361;
Hallock v. *Suitor,* 37 Ore., 9; 60 Pac., 384.

See also:

Speer v. *Erie R. R. Co.,* 64 N. J. Eq., 601, 610; 54 Atl., 539;
St. Louis Nat. Stock Yards v. *Wiggins Ferry Co.,* 112 Ill., 384; 54 Am. Rep., 243.

Summary.

The fact of the matter is that there is no basis whatever for the claim of estoppel. The railroad company did not do any act in reliance on any representation of the land company, nor did the land company negligently induce the railroad company to alter its position. The line on which the road was built was surveyed in March, 1909, and the survey was complete so that the railroad ordered work to commence the day that the arrangement with the Sherar executors was concluded (Tr., p. 483). The railroad did not

Summary. (Continued.)

know how high this line ran above low water level, not taking the trouble to ascertain this matter till after this suit was commenced (Tr., p. 381). But the railroad promised to build so that a 60-foot dam could be constructed. Boschke believed that the line adopted would be sufficiently high, but did not take the trouble to verify this belief. The only false representation made was that of the railroad. When requested to exhibit the profile of the line, Boschke showed a map, but the map did not show the water level. When this was commented on by Whistler, Boschke declared that the grade was sufficient to permit the maintenance of a 60-foot dam. He made this declaration without taking the trouble to ascertain either the water level or the past history of the stream in periods of high water. This was the only false representation made. Whistler doubted its truth, and the land company proceeded to investigate. It did not obtain the information till after the grade was partially constructed. This delay is now made the basis for a claim of estoppel, though the railroad was not completed or in operation at the time this suit was brought, indeed, the rails were not then laid. The railroad nevertheless resisted an injunction, alleging compliance with its agreement. The idea of estoppel was an afterthought, not pleaded or proved.

Inconsistent Position of Railroad Company.

Before closing on this branch of the case which deals with the rights of the defendant over the Sherar property, it is but proper to recall that the agreement between Sherar and the railroad was made by Sherar's heirs as the owners and claimants of the

entire tract of land of which they were then in possession; that is, both the property to which the patents had issued and property not patented till 1913. The railroad company dealt with the Sherar heirs as the owners and persons in lawful possession of the entire tract. Having entered on the entire property under the license, it attempts to set up title to part of the tract and claim as licensee on the rest. Obviously, this cannot be done in a court of equity. So, even if the railroad had established the priority of its right-of-way over the land patented in 1913 (which it has not done), it has nevertheless waived that right and entered the entire tract as licensee. It must abide by the terms of its license, and cannot repudiate the obligation as to part of the property and violate its obligation as to the rest.

Inconsistent Position of Railroad Company. (Continued.)

INTERIOR DEVELOPMENT PROPERTIES.

In the preceding pages of this brief we have dealt only with the questions concerning the Sherar lands. So far as the lands acquired from the Interior Development Company are concerned, the record is substantially as in the case considered. It does appear, however, that Welsh, one of the parties interested in the Development Company, was shown the profile map of the road as constructed, and expressed satisfaction with it.

Here, as in the case of the Sherar lands, the agreement provided for a 60-foot dam. *It does not appear that the road as constructed complies with the agree-*

ment between the Development Company and the Railroad, or that the Land Company purchased the properties of the Development Company with either knowledge or notice of the fact that any departure from the 60-foot agreement had been authorized.

No Right Existing in Favor of the Railroad over the Interior Development Company Lands Excuses the Performance of the Obligations Assumed in Relation to the Sherar Lands.

The lands of the Development Company are small in extent, consisting of two 40-acre tracts, and the existence of a right-of-way over part of these properties on the line on which the road is actually constructed is not fatal to the right to maintain a 60-foot dam at the Sherar Bridge. But apart from any technical question of this class, it is quite apparent that *the Railroad cannot claim against the Land Company under a contract by virtue of which it acquired its rgiht-of-way on condition that the road would be constructed so as to permit the erection of a dam 60 feet high, and at the same time dispute the right of the Land Company to erect such a dam, on the theory that this cannot be done without flooding the right-of-way where the same has been acquired over other property.*

Having entered into possession and claimed under a contract which obligated it to build its road at a point which will permit the maintenance of a 60-foot dam, equity will not permit the Railroad to assert any right which would nullify the obligation which it has assumed, and as a consideration for which it obtained the right of entry.

The Railroad Company must abide by its contract as a whole or pay damages in equitable condemnation as though no contract existed.

PART III.

DAMAGES.

The amount of damage sustained by the plaintiff has been variously estimated. Dillman says:

Damage to the Tract as a Whole.

"The main thing, however, is the liability of the power company in case they have to build with regard to the Deschutes Railroad. If the railroad company has a right to be in its present position, and the power company has to respect that right, as at present occupied, the power company could not develop its power for a great many years, if ever. If, on the other hand, the power company has a right to develope, and the responsibility of friction with a railroad company is entirely to be borne by the railroad company, the damage to the power development amounts to five per cent. of the power, plus the extra cost of construction by reason of the railroad being there. The first possibility, entire responsibility in the matter, means that the power possibility is worth very little at present and it is hard to estimate when it would be worth developing."

(See Transcript, p. 276.)

Kyle, Chief Engineer of the Oregon Trunk Railroad, said:

"Questions by the Court:

"How much less value has that tract of land with the railroad through it than it had without—the Sherar tract of land?

"A. Do you mean without one railroad or without both of them?

Damage to the Tract as a Whole. (Continued.)

"Q. Without the Deschutes Railroad.

"A. Well, if you take it as a power site proposition, I should say there was quite a good deal of difference.

"Q. Suppose the railroad was located right where it is now, taking the availability as you see it for a power site, how much less valuable is that power site with the railroad located where it is than it would be if it were located 4½ feet higher?

"A. Oh, I should say probably $75,000."

(See Transcript, p. 299.)

Damages of a Special Nature.

"The existence of the railroad where it is would make some difference in the cost of handling rock and material in the construction of the dam. I figure there would be about 30,000 yards of rock in the dam, and it would cost 20 cents more to handle it with the railroad there than without it, about $7500.

"Q. What is the fact as to the lands in controversy here owing to the situation in the Deschutes canyon, possessing a value for railroad right of way purposes at the time they were taken by the defendant?

"A. I know some of them seem to think they are very valuable—some of the people thought so. *We paid quite substantial prices for right of way across these properties on the Oregon Trunk side.*"

(See Transcript, pp. 298-299.)

The fact that the lands in question form the best power site in Oregon is stated by the defendant's own witnesses, and seems to be admitted (Tr., p. 467).

Apart from the heavy damage arising from the impaired value of the property as a whole, a good many small items of damage arise from the increased cost of construction and the necessity of clearing the

Damages of a Special Nature. (Continued.)

debris which the railroad took from the cuts and threw upon the dam site. The question of damage cannot be resolved upon this record.

If, as we respectfully contend, the Land Company has a right to erect and maintain a dam 60 feet high and the railroad is obliged to accept the risk of flood and bear the burden of such damage as results therefrom, the amount of damage is relatively small. If, on the other hand, the road is to be permitted to repudiate its contract and retain its present location, paying damages by way of equitable condemnation, a large sum must be allowed. Under either contingency, the matter must be remitted to the lower court.

THE LAND COMPANY SHOULD NOT BE DEPRIVED OF ITS RIGHT TO ERECT AND MAINTAIN A 60-FOOT DAM BY A DECREE FOR EQUITABLE CONDEMNATION.

Equitable Condemnation Should Not Be Decreed.

We respectfully submit that sound principles of equity require that a decree be entered declaring that plaintiff has the right to maintain a 60-foot dam at the Sherar Bridge and that the railroad right-of-way is subordinate to the easement to maintain such a dam.

The entry of the Railroad Company upon the lands was made pursuant to an agreement by which its right to build was expressly subordinate to the right of the owners to erect a 60-foot dam. There can be and is no pretense that the road cannot be constructed and its alignment changed so that this may be done. Nor is

Equitable Condemnation Should Not Be Decreed. (Continued.)

the estimated cost of such a change any heavier burden than is the amount of damage otherwise arising (Tr., pp. 276, *et seq.*). Indeed, the railroad always knew that money would have to be expended on the line when the dam was built, and Boschke so testified. On this subject he said:

Testimony of Boschke.

"Q. If the dam were constructed at the dam site only 60 feet in height, you have so built your railroad it would not affect your railroad at that place?

"A. No. I think it could be built there and protected, inasmuch as we would have to do more rip-rapping at those places, I mean.

"Q. In your affidavit you say a dam can be built there 50 (60 ?) feet in height, without affecting your railroad?

"A. Of course it can. That is only a nominal expense, a few thousand dollars to riprap those banks and make them safe, but we certainly wouldn't be spending that money now until there is a dam there to spend it for.

"Q. Then I understand, Mr. Boschke, that in your judgment, a dam can be built at the dam site 60 feet in height, and it wouldn't affect your railroad as now constructed at all?

"A. I think so.

"We had only one survey at the time of the conference with Mr. Laughlin—only one located line. We may have had some preliminaries. There was nothing said at the conference between me and Mr. Whistler in regard to the elevation of our road at the dam site. We do not reach our maximum height until we get two or three hundred feet south of the dam site.

"Q. Then how did you expect to protect your railroad at the dam site?

"A. Well, I don't—levees or something of that kind. I think there are some cuts in there; build a retaining wall or something like that. It is only a matter of a

Testimony of Boschke. (Continued.)

couple of feet there. It wouldn't be a hard job to keep out two feet of water. I don't recall that being discussed with Mr. Whistler. He had all the information. He had where our line was to be, and the bottom of the river was there on the ground, and he could easily tell what relation they bore to each other."

(See Transcript, pp. 342-343.)

The fact that as constructed the road is some five feet above the crest of the dam insures the continued operation of the road except in time of high flood, a matter of rare occurrence. The Oregon Trunk line is constructed at a proper grade and affords ample facilities for the service of the public during the occasional periods for which the operation of the Deschutes line may be interrupted. Public convenience does not require that the right of the Land Company to develop in a proper and economical manner the project which it has undertaken be subordinate to the right of the railroad to maintain its line as now located. In fact, the balance of public convenience inclines in favor of requiring the railroad to subordinate its rights to the rights of the Land Company, or move its track to a point higher up the canon. The economical development of power is as important, if not more important, to the public than is the maintenance of this road on the particular line adopted. There is, therefore, no reason why the obligations voluntarily assumed by the road should not be enforced. Equitable condemnation should not be de-

Testimony of Boschke. (Continued.)

creed in order to allow a public service company to disregard its contractual obligations unless public convenience so requires.

Unangst's Appeal, 55 Pa. St., 128.

THE DAMAGES AWARDED ARE WHOLLY INADEQUATE.

The decision of the lower court awarded no damages to plaintiff for the right-of-way over the land patented in 1913, though the existence of the right-of-way was decreed. This is, of course, erroneous, even if equitable condemnation is to be decreed. No severance damage was awarded plaintiff, though the utility of the tract as a whole was seriously impaired. The only award to plaintiff was of the sum of $1000 for land actually taken. Concerning this the court said:

> "The evidence shows that the defendant railway is located along the sides of a steep canyon over land of but little if any substantial value. There is no evidence in the record as to the quantity of land occupied by the road nor its value, but since the defendant admits and alleges that it agreed to pay the Sherar heirs a thousand dollars for the right of way in case the holder of the option did not purchase, I assume in the absence of other evidence that such an amount is a reasonable compensation to be paid for the land taken."

(See Transcript, p. 124.)

The negotiations between the railroad and Sherar may be in the nature of admissions against interest on the part of the defendant but are no evidence of value

Considerations inducing Sherar executors to accept a small price.

of the land so far as this plaintiff is concerned. Indeed, in agreeing on this sum the Sherar executors were affected by collateral considerations not in any way present in the case of this plaintiff. Concerning this, Huntington says:

> "The Sherar heirs were anxious for the construction of a railroad at that point. They owned a large body of land on both sides of the river and they thought the building of the road would enhance the value of their other lands."

(See Transcript, p. 179.)

> "The lands of the Sherar estate I referred to when I said that the estate owned other lands, the value of which was supposed to be enhanced by the building of the railroad, are the lands known as the Finnegan ranch, consisting of between two and three thousand acres, the nearest point of which to the railroad would be perhaps four miles; upon the hill in Sherman County. They also owned some land in Tygh Valley on the other side of the river. I think a section and a half or perhaps two sections. It was not considered that the building of the railroad would enhance the value of the Sherer lands in the canyon, which were under the Hostetler option."

(See Transcript, pp. 182-183.)

Burden of proof.

There is no evidence in the record justifying this award, and as the burden of proof was on the defendant, the decision cannot be sustained in any particular.

In cases of equitable condemnation, no issue concerning value is presented by the pleadings and the award of damages in lieu of injunction is made on the answer of the defendant and at its instance. As no pleadings raising the issue of the amount of damage

Burden of proof. (Continued.)

exist, the burden of proof necessarily rests upon the defendant after the right of the plaintiff has been made out pursuant to the ordinary rules of equity.

See

Seattle & M. Ry. v. *Murphine,* 30 Pac., 720;
Neff v. *Cincinnati,* 32 Ohio St., 215;
Park Com. v. *Trustee,* 107 Ill., 489;
Bellingham Bay Co. v. *Strand,* 30 Pac., 144.

We respectfully submit that the judgment must be reversed and that the cause should be remanded to the lower court with direction to decree that the rights of the railroad company are subordinate to the plaintiff's right to erect and maintain a 60-foot dam, and with further direction to that court to ascertain and determine the actual damage occasioned to plaintiff by reason of the manner in which the work was done and the value of the property taken subject to the easement. If this decree be made, no claim can be allowed for damage to the water power, but if the right-of-way be awarded to the defendant, free from the easement, then damages to the value of the property as a whole should be ascertained and awarded.

Respectfully submitted.

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No. 2814

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EASTERN OREGON LAND COMPANY
a Corporation
APPELLANT

vs.

DES CHUTES RAILROAD COMPANY
a Corporation
APPELLEE

DES CHUTES RAILROAD COMPANY
a Corporation
CROSS-APPELLANT

vs.

EASTERN OREGON LAND COMPANY
a Corporation
CROSS-APPELLEE

Brief of Appellee and Cross-Appellant Des Chutes Railroad Company

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F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

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EASTERN OREGON LAND COMPANY,
a corporation,
Appellant,

v.

DES CHUTES RAILROAD COMPANY,
a corporation,
Appellee.

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a corporation,
Cross-Appellant,

v.

EASTERN OREGON LAND COMPANY,
a corporation,
Cross-Appellee.

Brief of Appellee and Cross-Appellant Des Chutes Railroad Company

STATEMENT

This suit was originally commenced in April, 1910, by the Eastern Oregon Land Company, which we shall hereinafter designate as the Land Com-

pany, against the Des Chutes Railroad Company, which we shall hereinafter designate as the Railroad Company, to enjoin the Railroad Company from constructing its line of railroad over and across certain described lands along the Des Chutes River in Oregon, which the Land Company claimed to own. (Trans. 639.)

The cause of action, as stated in the amended complaint on which the case was tried, was entirely different from that stated in the original complaint. The gist of the original complaint was that the canyon of the Des Chutes River was especially adapted to the development of water power for the manufacture of electricity, and that the line of the Railroad Company was being constructed over the lands of the Land Company without any permission or authority whatever, and as so constructed would absolutely prevent the Land Company from building a dam in the Des Chutes River on its lands to a height *exceeding* sixty feet, and thereby the power which the Land Company would be able to generate would be greatly impaired and the cost of power greatly enhanced and the construction of the proposed power plant obstructed and imperiled.

We particularly ask the Court to note that the entire complaint of the Land Company as originally stated was on account of its inability to construct a dam exceeding sixty feet in height. It inferentially admitted that it could construct a dam to a height of sixty feet.

The gist of the second amended complaint is that

the Railroad Company had, prior to the entering upon the lands, entered into negotiations with the predecessors in interest of the Land Company for the right to enter upon said lands and construct its road, and had agreed with said predecessors in interest that it would construct its line at such height as to permit the erection of a dam on the lands in question, at the dam site, sixty feet in height from mean low water, and that no agreement or consent had ever been secured from the Land Company; that the Railroad Company had entered upon said land under said agreement and represented that its line was being constructed at such height and that prior to the purchase of said lands by the Land Company, it was informed of such representations and agreement with its predecessors in interest, and relying upon said representations and agreement, had purchased said lands and spent in excess of $50,000 therefor, and that the Railroad Company is estopped from denying that its line should be constructed at a height sufficient to permit a dam of sixty feet; that said line was not constructed to such height and that a dam of sixty feet would flood the line of the Railroad Company as constructed; that the line as constructed would greatly interfere with the construction of the dam and curtail the power that could be developed, and the Land Company would be damaged thereby. The prayer was for an injunction enjoining the Railroad Company from entering upon said lands claimed by the appellant and from constructing, building, maintaining and

operating its road over the same, or interfering with the possession or enjoyment of said lands in any way.

The answer of the Railroad Company admitted the ownership of part of the lands claimed to be owned by the Land Company and denied the ownership of others, setting up that part of the said lands claimed to be owned by the Land Company were, at the time of the entry of the Railroad Company thereon, unappropriated public lands of the United States and had been withdrawn from sale or entry by the United States for the purpose of irrigation works under the Act of Congress of June 17, 1902, and that the Railroad Company had acquired a right of way 200 feet in width over said lands by virtue of the approval of its right-of-way maps. As to other of said lands, the Railroad Company set up that same were owned by the Interior Development Company at the time of the entry thereon by the Railroad Company, which company had agreed and consented to the entry thereon and the construction thereover of the line of the Railroad Company at the location at which the line was constructed. As to the lands admitted to be owned by the Land Company, it was alleged that the entry thereon and the construction thereover of the line of the Railroad Company in the location in which the same was located, had been with the consent, knowledge, acquiescence and agreement of the Land Company and its predecessors in interest under an agreement that said Railroad

Company should pay therefor the sum of $1,000, which it was ready and willing to pay.

It was further alleged that the Railroad Company was the owner of lands located above the lands of the Land Company within the flow line of a dam sixty feet in height, which would be flooded by the construction, at the dam site involved in this case, of a dam to a height exceeding twenty-eight feet.

This, in general, is the position taken by each of the parties to this controversy.

The Court, after taking the testimony, in its original opinion, ordered that the complaint be dismissed. On rehearing, however, the Court determined the rights of the parties and declared the Railroad Company the owner of a right of way 200 feet in width over that part of the lands title to which was in the United States at the time of the entry of the railroad thereon and the approval of its map. Over that portion of the land which was owned by the Interior Development Company the lower Court determined that the Railroad Company was the owner of a right of way and had the right to maintain and operate its line as constructed by permission of the Interior Development Company; that as to the lands acquired by the Land Company from the Sherar heirs under the Hostettler option, the Railroad Company would be decreed to be entitled to a right of way thereover upon payment of $1,000 into Court within thirty days.

The Court, in view of this second decision, considered the case in the nature of a condemnation

suit and declared that the Railroad Company be required to pay the costs, in view of the fact that no tender of the $1,000 had been made to the Land Company prior to the commencement of the proceeding. The Land Company appealed from all that part of the decree except as to costs, and the Railroad Company filed a cross-appeal with reference to the decision of the Court awarding costs against it.

There is, accompanying the record, defendant's exhibit C, which shows the lands and location in question. The lands involved in this case, described in plaintiff's complaint, may be divided into four classes, to wit:

1. Those lands, the title to which was in the United States at the time of the commencement of this action. These lands are shown colored in brown on defendant's exhibit C.

2. Those lands, the title to which was in the Interior Development Company at the time of the commencement of this action. These lands are colored in yellow on defendant's exhibit C.

3. Those lands crossed by the line of the Railroad Company, title to which was derived from the Sherar heirs. These lands are colored in green on defendant's exhibit C.

4. The lands, title to which was claimed by the Land Company, but which are not touched or crossed by the line of the Railroad Company. These lands are shown outlined in green.

The line of the Railroad Company is shown in red on this exhibit. The right of way acquired from the United States Government south of the lands claimed to be owned by the Land Company, is shown in red, and that acquired from private ownership south of the lands claimed by the Land Company, is shown in yellow. The point marked "Dam site" on the map in question, is the point at which the notice of appropriation of water of the Interior Development Company was posted, and is the point referred to throughout the testimony in this case. The cross sections AA, BB, CC, DD, EE and FF on this map show the corresponding points on the profile on the upper end of the said exhibit.

ARGUMENT

I.

The relief sought by the Land Company's complaint cannot be granted by reason of the acquiesence of the Land Company in the construction of the Railroad Company's road over its land, with the knowledge that said road was being so constructed.

The relief sought by the Land Company in its bill of complaint was an injunction preventing the Railroad Company from maintaining or operating its railroad over and across the lands claimed to be owned by the Land Company. The acquiescence of the Land Company, however, in the construction of the Railroad Company's line, with knowledge of such construction, precludes it from removing the

railroad from the land. Even had it been found by the Court that the Land Company was the owner of the property claimed by it, yet by its acquiescence and failure to protest against the construction of the railroad, it waived the right to remove the railroad.

The law is well settled that where a land owner, knowing that a railroad has entered upon his land and is engaged in the construction of a road, without having complied with the statutes requiring either payment by agreement or proceedings to condemn, remains inactive and permits said road to go on and expend large sums in the work, the owner of the land is estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and will be restricted to a suit for damages.

> Roberts v. N. P. Ry. Co., 158 U. S. 1, 10-11.
> N. P. v. Smith, 171 U. S. 260, 274-275.
> Donahue v. El Paso R. R., 214 U. S. 499-500.
> Kindred v. U. P. R. R., 225 U. S. 595.
> City of N. Y. v. Pine, 185 U. S. 93, 99-100.
> U. S. v. Lynah, 188 U. S. 445, 467.

The work of construction over the property claimed to be owned by the Land Company was commenced in August, 1909, and was prosecuted diligently in August, September, October, November and December, 1909, and January, 1910, and in February the Railroad Company was still working on some of the heavier parts of it. The grade was

practically completed the latter part of February, 1910. (Testimony of G. W. Boschke, Trans. p. 331-2.) The Land Company had full knowledge of the fact that said line was being constructed on the lands in question, for it is alleged in the second amended bill of complaint (Trans. 22-23) "while it is true that the executors of the J. H. Sherar and the said Laughlin and the Interior Development Company and the engineers of your orator knew that the defendant had entered upon said lands and was constructing a railroad over the same, and while it is true that the said parties did not attempt, nor did your orator attempt until the bringing of this suit, to prevent the entry upon said lands by the defendant, or the construction of the said railway over said lands by the defendant, it is also true that the said Laughlin and the said Interior Development Company and the executors of J. H. Sherar were informed by the defendant that the railroad was being constructed in such manner as to permit the erection and maintenance by the owner of the lands described in the bill of complaint of a dam on the Des Chutes River * * * * sixty feet in height above ordinary low water of said river and that your orator had consented thereto."

Furthermore, it was shown in the evidence that J. W. Morrow, Tax and Right of Way Agent of the Railroad Company, on August 27, 1909, notified Huntington & Wilson, attorneys for the Sherar heirs, the owners of a part of the property, that

he, Morrow, had agreed with Mr. Martin, president of the Eastern Oregon Land Company, the holder of the option to purchase from the Sherar heirs, for the right for the Railroad Company to go upon the land and construct its line (Trans. p. 352-3). Mr. Huntington, of Huntington & Wilson, immediately and on the same day, to-wit, August 27, wrote Balfour, Guthrie & Company of Portland, Oregon, general agents of the Eastern Oregon Land Company, in which letter, among other things, he said: "We are in receipt of yours of the 27th and note your suggestion with respect to right of way. The assent of the representatives of the Sherar heirs to the crossing of the lands is conditioned entirely upon their obtaining the assent of the Eastern Oregon Land Company, or whatever person or company is the proposed purchaser under the Laughlin option. We have a letter from Mr. Morrow, dated yesterday, in which he states that he has seen Mr. Martin and obtained his consent that the Des Chutes Company proceed to build across the lands. He said, 'I am pleased to advise that I talked this matter over with Mr. Martin, of the Eastern Oregon Land Company, who has expressed a willingness to have us go upon the land to construct our line.' The representatives of the heirs are fully aware that they have no right at this time to consent to anything with respect to a right of way only as it meets your entire approval. If you or Mr. Martin have not given consent to their proceeding with the construction

of their road, it is obvious his, Morrow's mind should be disabused of an apparent impression he has received from the conversation with Mr. Martin." (Trans. p. 354.) The Sherar heirs, the owners of the property, therefore, had knowledge that the railroad was going upon the land to construct its road, and likewise the Eastern Oregon Land Company, the holder of the option to purchase, knew that said road was going there to construct under the apparent belief that it had agreed both with the Sherar heirs and with the Eastern Oregon Land Company so to do.

William MacKenzie, an officer of Balfour, Guthrie & Company, general agents of the Eastern Oregon Land Company, testified that a profile of the Des Chutes Railroad Company was submitted along in August or September or October, 1909, to the Eastern Oregon Land Company through Balfour, Guthrie & Company. (Trans. p. 225.)

John T. Whistler, an engineer employed by the Eastern Oregon Land Company, on October 6, 1909, reports to Balfour, Guthrie & Company: "Referring to your instructions by Mr. MacKenzie some ten days ago by telephone, to take up with the two railroad companies, *now building up the Des Chutes canyon,* the matter of their locations at Sherar Bridge Power Site * * * * Des Chutes R. R. Co.—Sherar Bridge Site: As I advised you he would do, Mr. Boschke at once turned over to

me blue print of their location and profi
miles above and below Sherar Bridge Si
pressed a readiness to give us any in
their office had, which would in any way
in considering the matter. The profile ha
does not show elevation above water su
river at proposed dam site, but Mr. Boschk
from what information he has in his office, hat he believes the location is about 70 feet above water surface at dam site. Our levels in conjunction with the elevations shown on profile would indicate that their location is only about 60 feet above water surface, but it is not certain which datum the bench mark from which our levels run refers, and I doubt if absolute assurance can be gotten without sending a man to the site to determine. In either case, however, I am reasonably certain the Railroad Company would object seriously to raising their location. An 0.8% grade was used by the company in climbing over the U. S. Reclamation Service's dam site, and this has been adopted as their maximum grade. From their profile, it appears they have used this to climb over the Sherar site, and to go higher would require them to change their location, not only throughout the entire climb, but as much farther north as necessary to obtain the increased elevation by length of line." (Trans. 226-229.)

Instructions having been given to Mr. Whistler ten days or so prior to the writing of this letter,

of [illegible] therefore, in September, at which time sho[illegible]as being constructed, and evidently the he[illegible]id construction was known to the agents tin[illegible]and Company who were in charge of the [illegible]. On receipt of this letter on October 6, [illegible]nt knew the line was being constructed and [illegible]e location was probably not over 60 feet abov[illegible] the surface of the water. Mr. William MacKenzie claimed in his testimony which was offered prior to the introduction of the letter from Huntington to Balfour, Guthrie & Company, above referred to, that he had talked with Mr. Morrow several times; that Mr. Morrow had spoken to him about a conversation he, Morrow, had had with Mr. Martin, president of the Eastern Oregon Land Company, on the train coming down from Salem, and their conversation on the subject of this right of way; that Morrow did not make any claim at that time that he had reached any agreement with Mr. Martin about the matter. On cross-examination, however, he testified (Trans. 222):

"I think my first intimation that Mr. Morrow claimed to have a right or permission from Mr. Martin to go on that land was in September, 1909. I don't think I communicated that information to Mr. Martin formally. I think the next time Mr. Martin came to Portland I talked to him about it. He was back and forth between San Francisco and Portland during that period periodically, not continually. *I did not write any letters to Mr. Morrow denying his claim, or questioning his authority*

for making any such statements. I thought Mr. Morrow's proposition so unthinkable that it was nothing short of a joke. Any railroad company that would expect to take the whole side of that canyon for a right of way for practically nothing at all, it would be absurd."

"Q. And you thought it so much of a joke that you wouldn't even communicate with Mr. Morrow, or take the trouble to write immediately to Mr. Martin about it.

A. I haven't said that I didn't write to Mr. Martin about it. I haven't said yet that I did not inform him, but so far as Mr. Morrow's talk was concerned, I did not take it at all seriously.

Q. But if you thought it was such a preposerous proposition, Mr. MacKenzie, wouldn't it be natural for a man of your business ability to take some means to ascertain the truth of such a rumor, and communicate with some person in authority to look into it?

A. No. I think if I were to take stock of all the preposterous things that arise I would be a very busy man.

Q. Even in connection with the agency which you are handling?

A. No, in connection with any agency or any business, one cannot busy himself with every ridiculous story that comes around.

Q. You just cast it out of your mind and let them go along.

A. I didn't take very much stock in it.

Q. And you didn't do anything to check the matter up or save the Des Chutes Railroad Company from proceeding on that assumption?

A. I think it quite probable that I mentioned Mr. Morrow's talk to Mr. Huntington, or to the Des Chutes Railway people just in the same way as I would mention anything else that had arisen about the property in a casual way. I was in touch with them off and on nearly all the time." (Trans. 222-24.)

As above stated, this testimony of Mr. MacKenzie's was given prior to the time the letter from Huntington to Balfour, Guthrie & Company of August 27th was introduced in evidence. The floating rumors referred to by Mr. MacKenzie that Mr. Morrow of the Des Chutes Railroad Company had agreed with the Eastern Oregon Land Company and secured its consent to go upon the lands, were undoubtedly the direct statement of Mr. Huntington in his letter to Balfour, Guthrie & Company that Mr. Morrow had advised him that he had agreed with Mr. Martin and that if this were not correct it was evident that Mr. Morrow was proceeding under a misapprehension and steps should be taken immediately to disabuse his mind. It seems to us that such a letter from the owner of the land which the Eastern Oregon Land Company were negotiating with should hardly be designated as floating rumors, nor should they warrant, nor would they have been received with the contemptuous

jocularity with which Mr. MacKenzie testified he received them, had it not been the fact that Mr. Martin and Mr. Morrow had agreed.

William MacKenzie was for years the land agent of Balfour, Guthrie & Company. Men of that character and capable of holding such positions know too well the consequences of permitting a person to go on and expend his money on the belief that a certain fact is true to permit the expenditure of hundreds of thousands of dollars, covering a period from August 27, 1909, to April 18, 1910, without protest or attempting to correct the impression. The understanding of Mr. Morrow was correct and known to be correct, or otherwise protest would have been made long before April, 1910.

Mr. MacKenzie states that he communicated these so-called floating rumors of Mr. Morrow's understanding to Mr. Martin, the president of the Eastern Oregon Land Company, on Mr. Martin's next visit to Portland after their receipt. This letter from Huntington to Balfour, Guthrie & Company was dated August 27, 1909. Mr. Martin was registered at the Hotel Portland in Portland, Oregon, from the 7th to the 9th day of October, 1909. (Testimony of Robe, Trans. pp. 516-17.) So that, provided Huntington's letter of August 27th was not sent to Martin at San Francisco, in any event it was communicated to him not later than October 7th, on his next visit here at Portland.

The claim of Mr. Morrow that he had agreed with Mr. Martin was true or Mr. Martin would have taken steps at that time to correct them. It is inconceivable that men of the business ability of Mr. MacKenzie and Walter S. Martin could have read that part of Mr. Huntington's letter which reads, "We have a letter from Mr. Morrow dated yesterday, in which he states that he has seen Mr. Martin and obtained his consent that the Des Chutes Company proceed to build across the lands. He said, 'I am pleased to advise that I talked this matter over with Mr. Martin of the Eastern Oregon Land Company, who has expressed a willingness to have us go upon the land to construct our line.' * * * * If you and Mr. Martin have not given consent to their proceeding with the construction of their road, it is obvious his, Morrow's, mind should be disabused of an apparent impression he has received from the conversation with Mr. Martin," and failed to take steps to disabuse Mr. Morrow's mind, provided the statements made by Mr. Morrow were not true. The only other possible alternative was that the claims of Mr. Morrow were perfectly true and known to be true by Mr. MacKenzie and Mr. Martin. This communication could hardly be designated as floating rumors because it was a direct communication from the attorney of the Sherar heirs, who owned the lands, to the company who held an option to purchase, and in response to a letter or communication from the Eastern Oregon Land Company warning the owners of the property

that such owners had no right to give the railroad a right of way across the lands while the option was outstanding in the Eastern Oregon Land Company. Notwithstanding this information and the employment of Whistler and his report of October 6th, 1909, to the effect that the line was constructed up the Des Chutes at an elevation thought by said engineer to be not in excess of 60 feet above low water, appellant admittedly made no protest until the beginning of this suit. (Complaint, Trans. p. 23.)

Mr. Broschke testified (Trans. pp. 332-33):

"Q. What, if any, steps, Mr. Broschke, were taken by anyone to stop the work of construction?

A. None whatever. I thought it was all settled. I got busy completing the railroad. I had an order to build it on the high line.

Q. Do you recall when it was you first heard of any protest against the construction of the line there?

A. Oh, I think the line was all done before I heard any protest. I don't—I think it was quite awhile afterwards. I don't recall anybody making protest at all until after the line was all built.

Q. Did Mr. Whistler ever make any objection to you that your line wasn't high enough for the purposes for which his client wanted to use the property there?

A. He spoke of the upper end, the way our grade lay, where the water came down, coming

down the natural grade of the river, would reach the water backed up from the dam; it would probably flood our grade in there. I said to him, that part of it, we would readily change that when the time came; when he had a dam there, but I did not believe in spending any money to change that at this time. He made no protest whatever as to the height at which our line was above the dam in that vicinity. He never attempted to stop us from going ahead, or tried to induce us to change our grade there. He never, other than that which I have just mentioned, indicated any dissatisfaction on the part of himself or the people whom he represented."

The Land Company has, therefore, stood by, knowing the line was being constructed at the height at which it was being constructed and acquiesced therein. It is, therefore, under the authorities above cited, too late to enjoin the use of the property, and the lower Court properly so refused to enjoin it.

II.

The Land Company did not acquire the property under representations that it had a right to construct a dam 60 feet high, and there is no estoppel against the Railroad Company to deny that fact. The Land Company acquired the property with full knowledge of the location and height of the line.

Prior to the completion of the trial the Land Company practically conceded that under the facts it would be unable to remove the Railroad Com-

pany from the land, and thereupon tried to prove as heavy damages as possible. The Land Company should, of course, win or lose on the case made in its complaint and sustained by its proof. The second amended complaint, upon which the Land Company went to trial, alleged as the grounds of its suit that it was the owner of certain specified lands along the Des Chutes River; that the Railroad Company had agreed with the predecessors in interest of the Land Company to construct its line at such a height as to permit the construction of a dam 60 feet in height above mean low water of the Des Chutes River at the dam site in Section 3, Township 14, S. R. 14 E., and that the Railroad Company had gone upon said land and was constructing its line under the representation that its line was of sufficient height to permit the construction of such dam as aforesaid; that the Land Company had purchased the land with the knowledge of such representation and agreement and had not discovered the fact that said road was not of sufficient height to permit the construction of a dam 60 feet in height until just prior to the commencement of this suit, and thereupon pleads that the Railroad Company is estopped to deny that its road is of sufficient height to permit the construction of a 60 foot dam. (Second Amended Complaint, Trans. 15 to 20.) The Land Company's proof, however, falls far short of proving this theory of the case.

In the first place, at the time of the commence-

ment of this suit, no claim or complaint was made whatever that the Land Company could not construct a dam 60 feet in height. Its only complaint was that it was not able to construct a dam in excess of 60 feet. Paragraph V of its original complaint reads as follows:

> "Notwithstanding the rights of your orator, and its ownership of said land, the defendant, without authority from complainant, and without right, and against the protest of complainant, has entered upon the lands of complainant above described and is now engaged in the construction of a railway over and across said lands; that said railway is so located that the construction over said lands will absolutely prevent the complainant from building a dam in the Des Chutes River on its said lands to a height *exceeding sixty feet,* and thereby the power which the complainant will be able to generate by means of the waters of the Des Chutes River on the lands above described will be greatly impaired and the cost of the power will be greatly enhanced and the maintenance and operation of said power plant when constructed will be greatly obstructed and imperiled."

Such claim, therefore, that said lands were purchased by the Land Company on the faith of the representations of the Railroad Company is untrue and is shown to be untrue by this allegation

in the original complaint admitting inferentially that said dam could be built to a height of 60 feet and basing its sole complaint on the fact that it could not be built to *exceed* that height.

The allegations of the second amended complaint to the effect that the land was purchased upon the faith of agreements or representations to the Land Company's predecessors in interest is further disproved by the allegations of paragraph VIII of the first amended complaint. (Trans. p. 651.) In this first amended complaint the Land Company alleges diametrically the opposite fact from that it is now seemingly trying to rely upon. Paragraph VIII of this first amended complaint reads as follows:

> "Complainant further showeth unto your Honors that defendant claims that the construction of its line of railroad over and across said lands is being done under license, consent and authority of the complainant and its predecessor in interest in said lands, and that said alleged license, consent and authority was given and granted pursuant to an agreement on the part of defendant to so construct its said line of railway as to permit of the construction of a dam in the Des Chutes River on the lands of complainant of a height of sixty feet above the low water mark of said river. In this regard complainant showeth unto your Honors that *it is informed by the agents and representatives of the predecessor in interest of*

your orator, with whom it is alleged said agreement was made, that no license or permission was ever given defendant to so construct its said line of railway as to permit of the construction of a dam in the Des Chutes River on the lands of complainant of a height of sixty feet above the low water mark of said river; and that in so far as complainant is concerned no consent, license or permission was ever given defendant to so construct its said line of railway on the lands of complainant as to permit of the construction of a dam on the Des Chutes River of a height of sixty feet above the low water mark of said river. * * * *"

This complaint was offered in evidence at the time of the trial and it will be seen that the Land Company here absolutely denies any contract for the elevation of the railroad sufficient to permit of the construction of a dam 60 feet in height with itself, and it alleges that it inquired of the representatives of its predecessors and that no such agreement existed with its predecessors. In view of such allegation, we do not see how it is possible for the Land Company at this time to expect to persuade this Court that it is acting in good faith when it alleges in its second amended complaint that such contract did exist with its predecessors and it purchased the property upon the faith of such contract. It certainly ought not to expect this Court to give much weight to its present claim.

In addition to the allegations of its original and first amended complaint, the Land Company has absolutely failed to prove its allegations of the agreement or understanding had with its predecessors in interest. These predecessors in interest are three as far as this controversy is concerned, to-wit: B. F. Laughlin, the Sherar Heirs, and the Interior Development Company. With reference to B. F. Laughlin the second amended complaint (Trans. 17) alleges:

> "Your orator further shows unto your Honors that it is informed and believes and therefore alleges that during said negotiations and before your orator purchased the Hostetler option from said Laughlin, it was agreed by and between the said Laughlin and the defendant railway company that the said defendant might enter upon the lands described in the contract between J. H. Sherar and wife and the said Hostetler, and locate and construct its railway line over the same, provided that the railway line should be so located, constructed, and maintained over said lands and over the lands above and below said lands that a dam sixty feet in height above ordinary low water in the Des Chutes River might be constructed in the Des Chutes River at any place on the lands in the said Hostetler option described. * * * *"

Mr. B. F. Laughlin, however, called as a wit-

ness on behalf of the Land Company, testified (Trans. pp. 518 to 519) as follows:

"I had a conversation with J. P. O'Brien, an officer of the Des Chutes Railroad Company, in regard to building a railroad over this property, which conversation I think took place in the latter part of February or first part of March, 1909. * * * * In that conversation Mr. O'Brien said he wanted me to get all the interested people to agree upon a price for a right of way on the river there, and at the same time guaranteed to protect the Sherar property to the fullest extent that it was possible. He called Mr. Boschke in and asked him about how they had run their grade on the river, and he said they had run it right along—a few feet from water. He told Mr. Boschke he would have to go back and re-run the line and save every foot of power for the Sherar property that could be saved. That they had examined the property with their engineer and that they might have to buy it before they got through, but to save every foot it was possible to save. Mr. Boschke remonstrated, said he would have to go back twelve miles. Well, he told him it didn't make any difference how far he had to go back, he must do it."

There is here no statement or proof of any agreement or understanding to protect a dam 60 feet above the low water mark. At most it was an understanding to save as much power as possible.

Again Mr. Laughlin testified (Trans. p. 529):

"I don't think any height of dam was mentioned by me. I don't have any recollection about that. We had planned upon a sixty foot dam, 60 foot above mean low water.

Q. Didn't you at that time agree that if they would elevate their line to a level that would be sixty feet above low water, or permit the construction of a dam sixty feet high, that they might go ahead with their construction?

A. *No sir, I did not.* I said they could go ahead with their construction at that time, provided they paid for it, at any height; if they wanted to pay for all the property they could go on water grade."

Again (Trans. 535) he testifies:

"Q. You say you talked sixty foot dam to Mr. O'Brien—did you talk sixty feet?

A. I would not say that I did; no sir; I would not say that; I might have had that in my mind and talked it and I might not. *I don't think I talked with Mr. Martin or to any of the Eastern Oregon Land people. Didn't tell them what the possibilities were there at all.* * * * *"

Again (Trans. p. 536):

"Q. In your conference with Mr. O'Brien and Mr. Boschke in the Wells-Fargo Building, you stated to them that it would be satisfactory to you

and to the people you represented for the railroad company to proceed and build on a right of way that would enable and permit the construction of a sixty foot dam, and that if they would do that and raise the line to that elevation, that you would see that the Des Chutes Railroad Company would be given the right of way for a nominal consideration.

A. *I did not. I had no talk with them or either of them to that effect.* * * * *"

Again (Trans. p. 537):

"Q. Now in your conversation over the 'phone, didn't you have an understanding with Mr. Morrow that they could proceed with construction across this property if that elevation was maintained by the railroad sufficient to go over a dam sixty feet high?

A. *I did not, at no time or at no place, nor in the presence of anybody at all.* I think Mr. Morrow was present at the conference I had with Mr. O'Brien and Mr. Boschke in February or March, 1909.

Q. Now, at that time and place, didn't you say to Mr. O'Brien and Mr. Boschke and Mr. Morrow that if they would raise the grade as high as they could, that you would be satisfied, and Mr. Boschke, the chief engineer, referred to his profile maps and stated that it was possible for him to reach a height so as to clear a sixty foot dam?

A. *It was not.*

Q. And you stated that that would be sufficient?

A. *I did not. The matter wasn't mentioned, any particular number of feet."*

It is evident, therefore, so far as Mr. Laughlin's testimony is concerned, it certainly falls far short of proving any such agreement or understanding as alleged by the complainant, to construct at a height sufficient to clear a sixty foot dam, and it not only does not prove the allegations of the second amended complaint that the Land Company had purchased the property and expended its money on the alleged representations of the Railroad Company to its predecessors in interest, that the line was to be constructed at a height sufficient to permit the construction of a 60 foot dam, but it flatly contradicts and disproves that allegation.

Mr. Laughlin was the holder of an option which was afterwards acquired by the Land Company, under which the Land Company acquired the Sherar property. The Land Company, in other words, stepped into the shoes of Mr. Laughlin.

Mr. Martin, president of the Eastern Oregon Land Company, in his testimony testified (Trans. p. 188) :

"Q. When did you first learn that the location of the road on the ground was such as to interfere with the construction of a 60 foot dam?

A. Well, this question of the construction of

a sixty foot dam is a thing I am not quite clear about. I understand that the railroad as now constructed is at 66 feet; that if the railroad company is satisfied with its own location, that all it has to fear is the flooding of its tracks in the flood season. It is physically *im*possible (?) to build a dam 60 feet there, but in case of flood the railroad right of way will be flooded. If that responsibility is up to them, why I don't know that I am concerned with it. If it isn't up to them, I am concerned."

Again (Trans. pp. 203, 204 and 205) Mr. Martin testified:

"A. One of the railroads had communicated with one of these representatives of this property, either the Sherar interests or Laughlin or Simmons; it was communicated to me, I think, in San Francisco—I am not sure if it was here. *What I said in reply to the thing was that if they do anything in regard to the right of way which damages the power value of that property, they do so at their own peril, and if they damage that property from the point of view of its power possibilities, we will feel free to retire from our contract.*

Q. Now, Mr. Martin, the railroad was practically constructed there before you paid any money in December, 1909, was it not?

A. Oh, the railroad was doing all kinds of things there.

Q. I mean it had men on the work and the grade

was practically completed at that time, across the Sherar property?

A. Well, I don't suppose that I was bound to assume that a perfectly illegal and violation proposition of that sort was binding on me.

Q. And you replied, if they interfered with the power proposition you would feel free to cancel it?

A. I don't believe it was a statement they had constructed and wanted permission; it was a request for permission to go upon the land. It didn't indicate that they had already built their road.

Q. To go upon the land?

A. To go upon the land.

Q. For what purpose?

A. For the purpose of building a railroad.

Q. Didn't you know before you paid any money the amount of construction that had taken place on that land?

A. No.

Q. You didn't care anything about that?

A. No. Oh, I don't say I didn't care. I didn't know.

Q. You didn't take any means to ascertain. You simply paid over your money irrespective of what had happened with reference to that desire of the Des Chutes Railroad Company to construct their line over that land?

A. *I ascertained that the people from whom we were buying the property had not in any way involved the property in any promises or agreements or deeds, or any act at all which involved the ques-*

tion of right of way. What remained to be settled if we bought was the question of whether the railroad had ever had any right to come on there at all, or not."

This is the only testimony by Mr. Martin with reference to any 60 foot dam or of any purchase by the Land Company on the strength of its knowledge of any agreement of the Railroad Company with its predecessors in interest. In fact, the testimony of Mr. Martin is positive to the effect that before purchasing he ascertained from his predecessors in interest that they had not in any way involved the property by any promises or agreements or deeds or any act at all which would involve the question of right of way.

Mr. William MacKenzie, agent of Balfour, Guthrie & Company, nowhere in his testimony refers to any such understanding. The negotiations between the Des Chutes Railroad Company and the Sherar heirs were carried on on behalf of the Sherar heirs by Mr. B. S. Huntington, their attorney, and by Mr. Grimes, one of the executors of the Sherar estate. There is absolutely no statement in Mr. Huntington's testimony as to any agreement to go to a height of sixty feet. The only understanding had in this regard was contained in the letter of Huntington & Wilson to J. W. Morrow, dated August 25, 1909, which reads (Trans. 175) :

"Confirming our telephone conversation of

this afternoon the executors of the will of J. H. Sherar, deceased, and who also are attorneys in fact for several of the heirs, are willing that the Des Chutes Railroad Company shall proceed with the construction of its road across the Sherar lands in the Des Chutes Canyon, provided the road is constructed sufficiently above the river as that it will not interfere with the use of the property for hydraulic purposes, and the persons who have agreed to purchase the property consent. The executors understand that if the persons who have agreed to purchase do not take the property that your company will pay one thousand dollars for the right of way. If the sale is consummated, as we assume it will be, then you are to settle with the purchasers for the right of way."

Mr. Grimes, one of the executors of the Sherar estate, testified (Trans. p. 542):

"Q. Mr. Morrow states, Mr. Grimes, that in the said negotiations for the purchase of the right of way you stated to him that the principal value of the lands lay in their availability for a power site; that the construction of a line of railroad would enable them to develop this water site, whereas without a railroad it would be practically impossible, and therefore as to the consideration for the right of way, so far as you were concerned you would be glad to donate the right of way in order to secure the construction of a line of railroad, but

that in view of the fact that there were many heirs to the estate it would be impossible to satisfy them without a consideration, and that you and he then agreed upon a consideration of one thousand dollars to be paid for the right of way through the Sherar estate property, and that you further agreed that the line of railroad should be built at such a height as to permit of the construction of a sixty foot dam. Now what do you remember about anything occurring from which Mr. Morrow made this statement?

A. I have no recollections of any such talk as that outside of Mr. Huntington's office, which I have just stated there before.

Q. Was anything said between you and Mr. Morrow when you and he were together alone, outside of Mr. Huntington's office?

A. In regard to this matter?

Q. Yes.

A. I have no recollection of anything being said.

Q. No conversation of that kind occurred between you two?

A. No, sir."

On cross-examination he testified (Trans. p. 547):

"Q. You didn't have any negotiations at all in regard to a dam site there with the railroad company?

A. Not any more than they were notified, that

is in our talk with Mr. Morrow, that if we gave them a right of way through there they would have to keep high enough to protect the dam site.

Q. How high a dam site would they have to protect there?

A. I had nothing to do about the figures that the dam site was to be, the height they were to keep. It was supposed to be from 60 to 65 feet, my understanding was.

Q. Wasn't it fifty-five feet you were talking about?

A. No sir, I don't think so. I never heard of any 55 feet.

Q. What did Mr. Morrow say about keeping up there to protect the dam site?

A. I have no recollection of his making any reply whatever."

Thus with regard to the purchase of the Sherar property, there is no testimony as to any such understanding, agreement or representation as is alleged in appellant's second amended complaint. Mr. B. F. Laughlin, the holder of the option to purchase, testified positively that he had no such understanding or agreement or representation. Mr. Huntington's letter is simply to the effect that the line should be sufficiently high that it would not interfere with the property for hydraulic purposes. Mr. Grimes had no understanding as to height and Mr. Martin, the president of the purchaser, likewise had no understanding as to height. So that

as far as the Sherar property is concerned, certainly the testimony is far short of proving that the same was purchased by the appellant under any representation whatever as to the height of the dam which the road should clear.

With reference to the Interior Development Company, the second amended complaint alleges (Trans. p. 16): "At the time such negotiations were commenced the Interior Development Company owned the northeast quarter of the southeast quarter of Section 9 above described, and also was claiming the northeast quarter of the northeast quarter of section 3 above described * * * *; and your orator is informed and believes and therefore alleges that it was agreed between the Interior Development Company and the defendant that the defendant should have the right to go upon the lands owned by the Interior Development Company and the lands claimed by the Interior Development Company, as above set forth, and construct its railroad over the same and upon the lands above said lands claimed and owned by the said Interior Development Company, provided that the railway line to be constructed over the said lands by the defendant should be constructed at such an elevation above the water of the Des Chutes River that the construction and maintenance of the defendant's railway line should not interfere with construction and maintenance of a dam sixty feet in height above ordinary low water in the said river where the

said river runs through the northeast quarter of the northeast quarter of said section 3 and above the falls of said river, and the defendant Railway Company agreed to so locate, construct and maintain its said railroad as to permit the construction, maintenance and enjoyment of a dam in the Des Chutes River above the falls thereof sixty feet in height above ordinary low water in said river at said point."

In order to prove this allegation of the second amended complaint, the Land Company called as a witness Mr. A. Welch, president of the Interior Development Company. The understanding and agreement between Welch, on behalf of the Interior Development Company, and the Railroad Company, was much more definite than with any of the others. Mr. Welch was an active, practical operator. He had his plans for his developments already drawn and in discussing the matter with the Railroad Company, he brought his plans with him. Mr. Welch testified as follows (Trans. p. 232):

"I was connected with the Interior Development Company during 1908 and 1909. * * * * During the year 1909 I went to the office of Mr. O'Brien, president of the Des Chutes Railroad Company, in the Wells-Fargo Building, some time I think in September, in company with Mr. Isaac Anderson of Tacoma. We took some maps of the Des Chutes River—and went over to find out how high the

railroad would be at the point of the dam site. We met Mr. O'Brien and talked over the matter, and he told us he would take us down to Mr. Boschke's office and show us the maps of the river, their surveys. We went down to Mr. Boschke's office and he showed us the maps. During our conversation Mr. O'Brien told him that we were one of about 150 filings that should be taken care of on the Des Chutes River. Mr. Boschke said that he had run his lines, and asked for the maps showing the height, which we examined. Then they asked about the right of way and we told them that if they would protect our filing, there would be no charges for the right of way. We specified the height of the dam as sixty feet, that we desired. The representative of the railroad company said that he had taken that into consideration. They showed us the maps of the railroad grades and heights, which showed, as I remember it, between 64 and 65 feet above low water. They had at that time already raised their levels to that height before we made a request for it. We discussed with them our water filing and they said they were familiar with it. * * * * We decided that that height would satisfy us as far as the railroad was concerned—I mean the height allowing for a sixty foot dam."

On cross-examination, Mr. Welch testified (Trans. 234):

"Q. You are still president of the Interior Development Company, are you?

A. Yes, sir.

Q. You are still interested in that property, are you, individually?

A. Yes, sir.

Q. Now when you went to the railroad company's office, they produced the profile showing the height of the proposed railroad at that place. Is that correct?

A. Yes, sir.

Q. And you expressed your satisfaction with that?

A. Yes, sir, with the map.

Q. And did you consider that that elevation would permit you to construct the dam in the manner in which you desired?

A. We were satisfied we could construct a dam so we could get sixty foot fall.

Q. And how had you in mind to construct the dam for that purpose?

A. Well, we had in mind putting in some floodgates one way; and another one was with splash boards.

Q. And that was practicable, you considered?

A. We considered it was practicable, yes.

Q. And you desired to have the railroad constructed there at that time, did you not, Mr. Welch?

A. How is that?

Q. *I say you were anxious to have the railroad constructed there at that time, provided you could still maintain your power development?*

A. *Yes, sir.*

Q. *In that manner?*

A. *Yes, sir.*

Q. *And you so expressed your satisfaction to Mr. O'Brien and Mr. Boschke. Is that not correct?*

A. *Yes, sir.*

Q. *And advised them that they could go upon the land and construct on the elevation shown on that profile, and if they did so, that they could have the right of way free of charge, as far as the Interior Development Company was concerned?*

A. *Yes sir, that was the understanding.*

The Court: *Mr. Welch, what did you say Mr. Boschke said the elevation of the road would be above water?*

A. *Above low water?*

The Court: *Yes.*

A. *The map he showed us was between, as I remember it now, between 64 and 65 feet.*

The Court: *Sixty-four or 74?*

A. *Sixty.*

The Court: *That is sixty-four?*

A. *Or five feet.*

The Court: *Yes, 64.*

Q. (Mr. Wilson.) *That is above low water surface?*

A. *Yes sir, above the low water surface.*

The Court: *You thought you could construct a*

sixty foot dam without interfering with the railroad; is that what you thought?

A. *That was our opinion, yes sir.*"

As far as the property acquired from the Interior Development Company is concerned, therefore, with the maps and profiles upon which the road was constructed, together with the maps of the dam before them at the time of the interview between the president of the Interior Development Company and the officers of the Railroad Company, at which time, with a full understanding of the height at which the railroad would be, to-wit, 64 or 65 feet above mean low water, it was agreed that if the Railroad Company should build on that elevation it should have its right of way across the lands of the Interior Development Company free of charge. It was also understood at that time that the clearance in question would give sufficient room to maintain the water level at sixty foot elevation without interfering with the operation of the railroad.

Here was a definite agreement and understanding between the parties and is contrary to the allegations of the complaint, provided it is the intent of the complaint that the appellant should have free room over the dam and was not required to take care of the flood waters. In other words, the understanding of the Interior Development Company and the Railroad Company was that the Interior Development Company would be able by the

use of splash boards or other means, to take care of the flood-waters within the distance allowed and maintain the water at a sixty foot elevation.

One tract of the lands owned by the Interior Development Company was right at the dam site, to one part of which the dam would have to be anchored. The other tract of land owned by the Interior Development Company was the NE¼ of the SE¼ of section 9, township 4 south of range 14 east, and within the flow line of the dam. The Land Company acquired this property of the Interior Development Company subsequent to this agreement and subsequent to the construction of the line. In fact, the NE¼ of the SE¼ of section 9 was not acquired until August 2nd, 1910, and lot one, being the NE¼ of the NE¼ of section 3, township 4 south of range 14 east, the property right at the dam site, was not acquired by the Land Company until the 4th day of April, 1914 (Stipulation, Trans. p. 171, paragraph 19) about one week prior to the trial of the case.

As to these properties acquired from the Interior Development Company, therefore, the line was built under permission and in full compliance with the agreement of the parties, and the Railroad Company has earned its right to a right of way over the same.

Mr. Welch was president of the Interior Development Company during all of the negotiations and still remained such at the time of the trial. (Trans. p. 234.) He and E. P. McCornack of Salem

owned all the stock of the Interior Development Company and Mr. McCornack was satisfied with the arrangement Mr. Welch had made with the Railroad Company. (Trans. p. 237.)

We have then this situation: The Land Company alleging agreements of the Sherar Heirs, Laughlin, and the Interior Development Company, its three predecessors in interest, with the Railroad Company of a right to go on the lands in question to construct, provided it did construct at a height sufficient to permit the construction of a dam 60 feet in height, and further alleging that the Land Company purchased with knowledge of these agreements and that thereby the Railroad Company is estopped to deny that it is required to so construct. The proof offered by it as to two of its predecessors, to-wit, Laughlin and the Sherar Heirs, absolutely denied any specific height, but simply asserted an agreement to protect the property for power development. As to the Interior Development Company the proof showed a specific agreement that the Railroad Company be permitted to construct in the exact location in which the line is constructed, and it being understood that a dam 60 feet in height could be maintained with the railroad at that location. As to any representations made to the Land Company upon which it relied for the purchase of said property, said witnesses are either absolutely silent or flatly deny any such representations, and in addition, the testimony of Mr. Martin, the president of the Land Company himself, is

positively to the effect that before purchasing the property he ascertained from his predecessors in interest that the said predecessors had not in any way involved the property in any promises, agreements, or deeds or any act at all which involved the questions of right of way. In addition to this oral testimony, the original and first amended complaint filed by the Land Company absolutely contradict such allegation.

Under such circumstances there certainly was no estoppel against the Railroad Company. No money was spent nor was the Land Company placed in any disadvantageous position by any representations made by the Railroad Company.

III.

The Interior Development Company owned the only water appropriation on the river, and that Company's agreement with the Railroad Company was binding upon the Land Company as far as said water right is concerned.

The only water right or right to construct a dam of any kind acquired by the Land Company or any of its predecessors was that acquired and held by the Interior Development Company. (Plaintiff's Exhibit 19, page 623 of the Transcript.)

Considerable stress was placed upon this water right by the Land Company and among the costs of the property to the Land Company it was shown that fourteen or fifteen thousand dollars had been

paid in development work for the purpose of keeping this water filing alive. (Testimony of Martin, Trans. 206-210.) The Eastern Oregon Land Company has never adopted a plan of development. (Trans. pp. 207-208.) The only water right, therefore, acquired or owned by the Land Company or any of its predecessors in interest was this right of the Interior Development Company, and this was owned by the Interior Development Company at the time of the understanding between Mr. Welch of that company and the Railroad Company to the effect that if the line were built at its present location, the same would be satisfactory to the Development Company. If the Land Company has acquired this water right, it is subject to the understanding and agreement had between Welch and the Railroad Company. If the Land Company has not acquired this right, then it had not at the time of the trial, and has not today any right to appropriate the waters of the Des Chutes River or to construct a dam therein.

IV.

The understanding and agreement of the parties was that if the line of the defendant Railroad Company were constructed at its present elevation across the lands in question, it would be sufficient. In any event, the Land Company and its predecessors in interest are by their actions and admissions estopped to question that fact.

We have pointed out in the foregoing part of this brief the testimony in the record, with reference to the negotiation between the Land Company and its predecessors in interest and the Railroad Company. So far as the Interior Development Company is concerned, there can be no doubt that the agreement between these parties, with the maps of the developments of both concerns before them, was definite to the effect that if the line were located as at present constructed, it would be sufficient for the development contemplated by the Development Company, and it was agreed between the parties that the Development Company should have the right to construct and could construct with the line of the Railroad Company as at present constructed, a dam of 60 feet, by making proper provisions in the dam to take care of any flood-water. With reference to B. F. Laughlin, the Sherar heirs, and the Land Company itself, in view of the conflict of the testimony, the lower Court refused to find that any agreement existed between them, and assessed the damages by reason of the construction of the

line across said lands of the Sherar property. (Opinion on rehearing, Trans. 121.)

We think that the lower Court would have been justified in holding, under the evidence, that the said Laughlin, Sherar heirs, and the Land Company, are estopped to question that the line was constructed in its present location on the understanding that the development of the property for hydraulic purposes would not be interfered with and that the damages for construction would be nominal.

Considerable space is devoted in the brief of the Land Company to an attempt to show that the lower Court had actually held the Land Company estopped as here contended. We do not so read the opinion of the lower Court, but do maintain that such holding was justified under the facts. In the first place, the consent of the Sherar heirs was given provided the road was constructed sufficiently above the river "as that it shall not interfere with the use of the property for hydraulic purposes." (Trans. p. 175.) Mr. B. F. Laughlin induced the Railroad Company to raise its survey for the purpose of saving the power possibilities of the property, and while it is true he asserts the Railroad Company was to pay him whatever damages it did to the property and the power development, yet the testimony of all of the witnesses for the Railroad Company was to the effect that if the Railroad Company did raise its grade to a height of from 45 to 60 feet, Laughlin would be satisfied and indicated

that the damages would be nominal. (Testimony of O'Brien, Trans. pp. 319 and 320. Testimony of Boschke, Trans. pp. 328 *et seq.* Trans. 344 and 345.)

With reference to the Land Company itself, Mr. J. W. Morrow, Tax and Right of Way Agent of the Railroad Company, on August 27, 1909, advised Huntington & Wilson, attorneys for the Sherar heirs, as follows: "And at this time I am pleased to advise that I talked this matter over with Mr. Martin of the Eastern Oregon Land Company, who has expressed a willingness to have us go on the land and construct our line" (Trans. p. 353), and on the same date Huntington & Wilson advised Balfour, Guthrie & Company, the general agents of the Eastern Oregon Land Company, as follows:

> "In re Sherar lands. We are in receipt of yours of the 27th and note your suggestions with respect to rights of way. The assent of the representatives of the Sherar heirs to the crossing of the lands is conditioned entirely upon their obtaining the assent of the Eastern Oregon Land Company or whatever person or company is the proposed purchaser under the Laughlin option. We have a letter from Mr. Morrow, dated yesterday, in which he states that he has seen Mr. Martin and obtained his consent that the Des Chutes Company proceed to build across the lands. He said, 'I am pleased

to advise that I talked this matter over with Mr. Martin, of the Eastern Oregon Land Company, who has expressed a willingness to have us go upon the land to construct our line.' The representatives of the heirs are fully aware that they have no right at this time to consent to anything with respect to a right of way only as it meets your entire approval. If you or Mr. Martin have not given consent to their proceeding with the construction of their road, it is obvious his, Morrow's, mind should be disabused of an apparent impression he has received from the conversation with Mr. Martin. In our telephone talk and in our letter confirming the same we conditioned the assent of the heirs upon their obtaining the assent of the persons who have agreed to purchase the property, and Mr. Morrow must understand that we are not in any way consenting to any act which is not entirely assented to by you." (Trans. 353, 354.)

This letter was undoubtedly the floating rumors which Mr. MacKenzie of Balfour, Guthrie & Company referred to in his testimony, as follows (Trans. p. 221):

"Q. When did it first come to your knowledge that the Railroad Company claimed to have any permission for a right to be upon those lands because of any conversation with Mr. Martin? That is, was it before or after the bringing of this suit?

A. I think some time in the early part of September there was some floating talk came to me about it. I cannot recall exactly where it came from. * * * *"

And again on cross-examination (Trans. p. 222):

> "I think my first intimation that Mr. Morrow claimed to have a right or permission from Mr. Martin to go on that land was in September, 1909. I don't think I communicated that information to Mr. Martin formally. I think the next time Mr. Martin came to Portland, I talked to him about it. He was back and forth between San Francisco and Portland during that period, periodically, not continually. I did not write any letters to Mr. Morrow, denying his claim, or questioning his authority for making any such statements."

Mr. Martin, president of the Land Company, was registered at the Portland Hotel in Portland from August 20th to the 26th, and from October 7th to the 9th. (Trans. p. 517.) He was therefore here on the date on which Mr. Morrow advised Huntington & Wilson he had received Martin's consent, and as he was here from the 7th to the 9th of October, Mr. MacKenzie, of Balfour, Guthrie & Company, must have communicated to him at least by that time the information which he had received from Huntington & Wilson as to Mr. Morrow's claim. Prior to this time, however, Mr. Whistler, an engi-

neer, had been employed to examine the project and determine where the line of the defendant was to be constructed. He had been given the profile and map of the Railroad Company and on October 6th, the day before the arrival in Portland of Walter S. Martin, the president of the Eastern Oregon Land Company, Mr. Whistler wrote to Balfour, Guthrie & Company, the agent of the Land Company, as follows (Trans. pp. 228, 229):

> "Deschutes R. R. Co.—Sherar Bridge Site: As I had advised you he would do, Mr. Boschke at once turned over to me blue-print of their location and profile for some miles above and below Sherar Bridge Site and expressed a readiness to give us any information their office had, which would in any way assist us in considering the matter.
>
> "The profile handed me does not show elevation above water surface of river at proposed dam site, but Mr. Boschke states from what information he has in his office, that he believes the location is about 70 feet above water surface at dam site. *Our levels in conjunction with the elevations shown on profile would indicate that their location is only about 60 feet above water surface, but it is not certain which datum the bench mark from which our levels run refers, and I doubt if absolute assurance can be gotten without sending a man to the site to determine.*
>
> *"In either case, however, I am reasonably certain the Railroad Company would object*

seriously to raising their location.. An 0.8% grade was used by the company in climbing over the U. S. Reclamation Service's dam site, and this has been adopted as their maximum grade. From their profile, it appears they have used this to climb over the Sherar site, and to go higher would require them to change their location, not only throughout the entire climb, but as much farther north as necessary to obtain the increased elevation by length of line."

Mr. Martin on his stay in Portland from October 7th to 9th undoubtedly considered this report of Whistler on the Sherar property and the information which he had received as to the exact location and height of the railroad line, and the further fact that the Railroad Company would object to raising the same. Whistler undoubtedly secured this information as to the objection of the Railroad Company to raising the same from Mr. Boschke, the Chief Engineer of the Railroad Company, when he saw him in connection with this project and when the map and profile were furnished him by Mr. Boschke. Mr. Martin knew that this line was perhaps not over 60 foot above the low water mark. The Railroad Company, in making the survey, had climbed on its maximum grade, in accordance with its statement to Mr. Laughlin that it would do, prior to the change of the survey. At the same time Mr. Martin received the report of Whistler, he must have been advised of the claim of Mr. Morrow that

he had received Mr. Martin's consent to go upon the land and construct, because October 7th was Mr. Martin's next visit to Portland, after MacKenzie had received the information of such claim from Mr. Huntington's letter. (Trans. p. 223.) Therefore Mr. Martin must have received at one and the same time the information contained in the Whistler report as to the exact elevation at which the road was being constructed, and also the fact that Mr. Morrow was claiming that the Railroad Company was going upon said land with his, Martin's, consent.

Yet, notwithstanding these facts, Mr. Martin made no objection to the Railroad Company nor claimed that the said line was not being constructed in accordance with his understanding with the Railroad Company, but he remained silent and permitted the Railroad Company to go ahead and construct its line and spend its money on the faith of the fact that said line was being constructed in accordance with the understanding with him, and his predecessors in interest, and in the face of the warning from Mr. Huntington, an attorney for the Sherar heirs, that if the line was not being constructed in accordance with the understanding with Mr. Martin, that Mr. Morrow's mind should be disabused, as he was acting upon such understanding. We submit, therefore, either that the railroad was being constructed in exact accordance with the understanding of the parties, or, if not, then the Land Company is estopped to deny it.

Considerable space is devoted in the Land Company's brief to an attempt to show that no estoppel exists as against the Land Company, and a number of authorities, in attempting to sustain their theory, are cited. Within the State of Oregon, however, the matter is determined by a provision of our Code, Section 798, Subdivision 4, Lord's Oregon Laws, which reads as follows:

> "Whenever a party has by his own declaration, act, or omission, intentionally and deliberately lead another to think a particular thing true, and to act upon such belief, he shall not in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

Mr. B. F. Laughlin, the holder of the option which was afterwards acquired by the Land Company, induced the Railroad Company to raise its survey, and spend its money to make such re-survey, on the understanding and belief that the same would protect the water rights and development which he claimed to own. The Sherar heirs gave their consent on the understanding that the property would be protected for power development.

The president of the Land Company, himself, and the agents of the Land Company, Balfour, Guthrie & Company, knew exactly where the Railroad Company was constructing, and that it was constructing under the belief that said line would protect the water development and prevent any claims of damage on the part of the Land Company. They knew

these facts when the grading was in its incipient stage. They were warned by the attorneys for the Sherar heirs on August 27, 1909, that the Railroad Company was proceeding under such belief and that if such were not the fact the Railroad Company's agent's mind should be disabused of the impression under which it was acting. These facts, we submit, show at least an intentional and deliberate omission on the part of the Land Company to act when it should have acted, and such intentional and deliberate omission, under our Code, estops it from denying that the line is constructed at the point where it was agreed it should be constructed, or at a point where it would protect the property of the Land Company for power development. When the parties in their letters and in their negotiations were using the expression, "that the power development of the property be protected," such expression must be interpreted in the light of the developments which such properties permitted, and in arriving at the meaning of that expression, it is pertinent to inquire what development the properties permitted.

The Sherar property did not extend further south on the east side of the river than the northwest quarter of the southwest quarter of section 10, township 4 south, range 14 east, and the furtherest south of any property on the east side of the river acquired by the Land Company was and is the northeast quarter of the southeast quarter of section 9, which was one of the properties acquired from the Interior Development Company. South of this point,

on the east side of the river, the Land Company had acquired no rights, and it could therefore not raise the water of the river above this point. No dam could be constructed at the dam site in question to a height in excess of 28 feet that would not raise the water above the south line of the northeast quarter of the southeast quarter of said section 9. (Testimony of Kelly, Trans. p. 455.)

Mr. Martin, president of the Land Company, admitted this fact when he testified (Trans. p. 206): "There are lands in private ownership that would be under the flow line of the reservoir with a dam 60 feet high, that the Eastern Oregon Land Company does not own. The Eastern Oregon Land Company would have to acquire such rights before it could construct a dam, and it hasn't such rights today."

So that, when the parties were negotiating and used the expression "that the line be raised sufficiently to protect the power development of the properties," those power developments of the properties were limited to a raising of the water but 28 feet at the dam site in question.

It is asserted in the brief of the Land Company (we are not able to refer to brief of the Land Company as we have been furnished only with typewritten notes): "But it is admitted that the road as built does not conform to the agreement with the Sherar executors, either as stated in the Huntington letter or in the testimony of Morrow," and again it is stated, "It is the admitted fact that the

road as constructed does interfere with the use of the property for hydraulic purposes." We are at a loss to know whence counsel deduces such admissions. We have maintained throughout and proved, and the fact is nowhere disputed by the Land Company, that the property of the Land Company does not permit of a development which raises the water to a height in excess of 28 feet at the dam site. The line does fully comply with the understanding expressed in Huntington's letter to Morrow that "it (i. e. the line) will not interfere with the use of the property for hydraulic purposes," and likewise with the arrangement with Laughlin, the holder of the option, as testified to by him, that the power development of the properties be protected.

The line is likewise high enough to permit of the construction of a dam 60 feet in height as determined by the Interior Development Company and the Railroad Company. This was the practical construction placed upon the agreement by the companies at that time with the plans of both before them. It was likewise the understanding of all the others. The Court should consider the question which was before them before the line was constructed, to-wit: How high can the railroad raise its line? And how will this permit the dam to be constructed? The power developers were wanting to get as much power as the line would permit. The president of the Interior Development Company and the Railroad Company determined with

their plans before them that the height of the line permitted the construction of a dam in a certain manner of 60 feet, and it is not disputed today that the dam of such character can be constructed without interference.

The Interior Development Company had the only appropriation which permitted the construction of any dam whatever and the very right under which the Land Company today is claiming the right to construct. This fact having been thus determined with reference to this identical dam site and with reference to the only appropriation of water at that point and with the company which owned the right and the only right to develop it, was quite naturally considered by the railroad officials as fully settled and determined, and the testimony of Mr. Morrow on which the Land Company lays so much stress, should be considered in the light of such fact. Mr. Morrow testified (Trans. p. 359):

"Q. Then in that conversation it was agreed that the elevation should be sufficient to allow the building of a 60 foot dam?

A. Well, I don't think so, Mr. Minor. Now, I will tell you about that 60 foot dam. I am satisfied Mr. Boschke said he could reach an elevation—if not positively—I think positively of 60 feet. That is the way I have it in my mind. And the dam site or the dam—I think that I reached that conclusion subsequently, and after the survey was made, and

had an understanding that it was possible to construct a dam at the height of 60 feet. * * * *"

And again, at page 361, he testified:

"Q. Mr. Grimes insisted and you agreed that the railroad should be built at such an elevation as to admit of the construction of a 60 foot dam?

A. No, Mr. Grimes never insisted upon any particular height at all; nor did Mr. Huntington. It was simply my statement to them that we could do that, to which they offered no objection, but were satisfied with it.

Q. But it was agreed that the railroad should be built at an elevation to admit of the building of a 60 foot dam?

A. I negotiated with them, as I believe, with that understanding."

And again at page 363:

"In all our negotiations with any parties interested in that property, the principal point of contention was the height of the dam; the power sites were always interested, in avoiding the possibility of interfering with the construction of the dam, and in all these negotiations, the height was always at a 60 foot level above the low water flow of the Des Chutes River, according to my understanding of it, and I think that is right.

Q. In other words, in all your conversations with all these parties, they all insisted that you

should build your railroad to such a height as to permit of building a 60 foot dam?

A. No, they never insisted. They never insisted. The fact of the business is there wasn't such a great amount of obligation put upon this dam site. *I gathered the information after the line was surveyed* that we could build—that we would build at an elevation admitting of the construction of a dam at that height; and I think it was entirely my suggestion to these people, to which they never offered any objection. I don't think the height of the dam was seriously discussed."

This belief and understanding of Mr. Morrow, which he said he derived after the survey was made, that a dam 60 feet high could be built, undoubtedly emanated from the definite understanding between Welch of the Interior Development Company and the railroad officials, to which Mr. Welch testified: Such a dam can be built and is practicable.

(Wickersham, Trans. pp. 430-434.
Kelly, Trans. pp. 458-462.
Welch, Trans. pp. 235-236.)

These matters were undoubtedly understood by all parties up until after the commencement of this suit. The plaintiff itself so understood. As we have already pointed out, its original complaint was on the ground only that its right to construct *in excess of 60 feet* was interfered with.

Although the Land Company had full knowl-

edge of the exact location of the line and the fact that the line had been under construction since August, 1909, and that it was being constructed under the belief on the part of the Railroad Company that it was satisfactory to the Land Company, it made no protest or objection to the Railroad Company until after the J. G. White report on the power project had been received in March, 1910. Mr. Martin testified (Trans. p. 197):

"Q. And you never made any objection to the company on account of the method in which they were constructing their line, on account of any information that was furnished you or otherwise?

A. I did.

Q. At what time?

A. I came up here as soon as I received the J. G. White report and I went to see Mr. Morrow, and I told him what was contained in this J. G. White report. The preliminary J. G. White report was made on March 3rd, 1910.

Q. And that was five months after the line had been constructed across that property.

A. Well, I can't help that; you asked me when we objected. I objected as soon as I had information on which to base an objection."

The objection when made by the Land Company was not that the line prevented the construction of a dam 60 feet in height, but that it prevented construction in excess of that height. Mr. Martin testified (Trans. p. 213):

"The best of my recollection of my interview with Mr. Morrow, the right of way agent of the defendant company, in March, 1910, is that I had received a report from J. G. White & Company, which had been made up for the purpose of determining which was the most efficient and economical plan for the development of the Sherar Bridge property; that their recommendations were in favor of a dam very much higher than anything that had been spoken of in connection with the site above, which was over one hundred feet, and that if we could reach a conclusion that would be amicable, I was willing then to agree on a right of way, contemplating less than the whole height which they recommended, but as we had associates in this property and as the property represented the expenditure of a good deal of money in the purchase, we could not give them a right of way without charge, but we would therefore have to ask for damages on the basis of the opportunity we had there."

It was only, therefore, after J. G. White & Company had made a report that the economical height of a dam was in excess of 100 feet, that any controversy arose, and it was only for the purpose of enforcing some right in excess of 60 feet, which the Land Company conceived it had, that this suit was brought. The Land Company had, however, waived its rights above 60 feet and this fact developed in the application for a preliminary injunction. It was then for the first time that the Land Company advanced the theory that it could not construct to 60

feet or that it should have the right to construct a dam without providing for taking care of the flood-waters as contemplated in the negotiations as above pointed out. This contention of the Land Company was an afterthought and a contention forced by the necessities of the case.

The Land Company having taken the position that its complaint was on account of the inability to construct in excess of 60 feet, and never having made any complaint and having acquiesced in the construction of the line as at present constructed, is estopped at this time to raise the question that the line is not built in accordance with the understanding, or is insufficient to permit of the construction of a dam 60 feet in height or to protect the water development of the property.

As said by this Court in the case of Polson Logging Company vs. Neumeyer, 229 Fed. 707:

> "The objections now relied upon to defeat the action were confessedly not made until about a week before the actual trial of the case and long after the suit had been brought and more than a year after the steel had been shipped to the purchaser, during which time the respective parties were disputing by telegraph and letter over the fact of the alleged sale and the alleged fraud and lack of authority on the part of their respective employees. We think the objections now relied upon were made altogether too late. It is quite true that mere

silence at a time when there is no occasion to speak is neither a waiver or evidence from which a waiver may be inferred, especially when unaccompanied by any act calculated to mislead the party. But surely a buyer of merchandise must either accept or reject it when tendered by the seller and is bound to do one thing or another within a reasonable time. In the present instance the buyer made no objection within any reasonable time to the overweight of the steel nor to the length of the bars but based its refusal to accept the shipment exclusively upon the grounds above stated, which grounds the jury found were without any foundation."

The Court then quotes as authority a great many cases. In the case of Railway Company vs. McCarthy, 96 U. S. 258, 267, the Court says:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot after litigation has begun change his ground and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." Quoting numerous cases.

In Davis vs. Wakelee, 156 U. S. 689, the Supreme Court of the United States again says:

"It may be laid down as a general propo-

sition that where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

The same principle was applied by the United States Supreme Court in the case of Harriman vs. Northern Securities Company, 197 U. S. 293-4, and is sustained by numerous authorities, including the following:

Oakland Sugar Mills Co. v. Fred W. Wolf Co. (CCA), 118 Fed. 248.
Smith v. Boston Elev. Ry. Co., 184 Fed. 389.
Davis and Rankin Bldg. & Mfg. Co. v. Dix, 64 Fed. 406, 410, 411.
Lorane Mfg. Co. v. Oshinsky, 182 Fed. 407.
Southern Cotton Oil Co. v. Shelton, 220 Fed. 256.

The Land Company assumed the position its entire complaint was because it could not build in excess of 60 feet. The Railroad Company accepted that as the true position of the Land Company, and met it on that assumption, and under the authorities cited, after the Railroad Company had met it on that ground, the Land Company was estopped from thereafter mending its hold and taking the position that it could not construct even

to 60 feet, especially in view of the fact that it is physically possible to build a dam 60 feet without interference and in view of the fact that that was the definite understanding and agreement between the Interior Development Company and the Railroad Company, it being understood in such agreement that proper provision would be made in the dam to take care of the flood-water.

We submit, therefore, that the Court should hold either that the line as constructed fully complies with the agreement of the parties and their predecessors in interest, or that the Land Company is estopped to deny that the same is so constructed.

V.

The compensation allowed by the lower court is ample to cover any damage sustained by the Land Company by virtue of the construction of the line in its present location.

The lower Court, in view of the conflict of the testimony as to the agreement, refused to find any such agreement but assessed $1000 as damages and gave the railroad its right of way over the property under the principle laid down by the United States Supreme Court in City of New York vs. Pine, 185 U. S. 93, Andrus vs. Power Co., 147 Fed. 76, and other cases.

In assessing the damages, the same were and should be assessed, of course, as if no contract or agreement were entered into. The entire testimony as to damage offered by the Land Company was

with reference to curtailment of power development. There has been no curtailment of the power development of the property. The Land Company's property permits the raising of the water, as we have pointed out, only to a height of 28 feet at the dam site. It has ample room to develop to this height. The line is 64.67 feet above low water at this point. It cannot build so as to flood the line because the railroad has acquired definite rights over the property formerly held by the Interior Development Company. One of these tracts is right at the dam site, the other a short distance above. Besides the Railroad Company has land immediately above that held by the Land Company which it acquired from the Government and from private owners (Stip. par. 6, 7, Trans. p. 159, par. 15, p. 164), which the Land Company cannot flood. In determining the Land Company's damages, the Court cannot take into consideration the power possibilities of the property as if it owned the land further up the river, but it can take into consideration only the lands and flowage rights it actually owns.

In the case of Grays Harbor Boom Company vs. Lounsdale, 54 Wash., page 21, the Court had before it a condemnation case in which the defendant was seeking to enhance its damages by showing a value for certain purposes for which the property was not available except in connection with land already acquired by the condemning company. The Court, in regard to the right of such land owner to have

taken into consideration elements not owned, for the purpose of increasing the damages for the property taken or impaired, says:

> "If this were not true, as a matter of law, the testimony upon this feature of the case is too vague and uncertain to warrant a verdict. It is not shown that the use of respondent's land for a sawmill is contemplated or even probable within any reasonable time, *or that it could be so used independently of lands occupied by petitioner.* The contemplated use in proper cases must *not only be available* but valuable. In this connection, an available use means a possible use, not a use contingent upon the abandonment of the use of adjoining property engaged by another in the public service of the state, or upon conditions remote, uncertain, and speculative."

In the present case the Land Company is trying to have considered as an element of its damage, a use which is not available because it contemplates the use of property above that owned by the Land Company, which is in the possession of the Railroad Company and already devoted to other public service. Therefore such element under the cases cited cannot be considered.

The United States Supreme Court has taken a similar view of this situation. In Boston Chamber of Commerce vs. Boston, 217 U. S. 194, the defend-

ant was the owner of the property in question on which there was an outstanding easement and the land owner was attempting to have considered for the purpose of enhancing the value of the property taken, the rights of both the defendant and of the owner of dominant servitude. The Court says:

> "The only question to be considered is whether when a man's land is taken he is entitled by the 14th amendment to recover *more than the value of it as it stood at the time.* For it is to be observed that the petitioners did not merely contend that they were entitled to have the jury consider the chance of getting a release, for whatever it might add to the market value of the land, as the city merely contended that the jury should consider the chance of not getting one. The petitioners contended that they had a right, as a matter of law, under the Constitution, after the taking was complete and all rights were affixed, to obtain the connivance or concurrence of the dominant owner, and by means of that to enlarge a recovery that otherwise would be limited to a relatively small sum. It might be perfectly clear that the dominant owner never would have released short of a purchase of the dominant estate—in other words, that the servitude must have been maintained in the interest of lands not before the Court—but still, according to the contention, by a simple joinder of parties after the taking,

the city could be made to pay for a loss of theoretical creation, suffered by no one in fact.

"The statement of the contention seems to us to be enough. It is true that the mere mode of occupation does not necessarily limit the right of an owner's recovery. Boom Co. vs. Patterson, 98 U. S. 403, 408. Louisville & Nashville R. R. Co. vs. Barber Asphalt Co., 197 U. S. 430-435. But the Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained. We regard it as entirely plain that the petitioners were not entitled as a matter of law to have the damages estimated as if the land was the sole property of one owner, and therefore are not entitled to $60,000 under their agreement."

Again in McGovern vs. United States, 229 U. S. 372, the United States Supreme Court says:

"The enhanced value of the land as part of the Ashokan reservoir depends on the whole land necessary being devoted to that use. There are said to have been hundreds of titles to different parcels of that land. If the parcels were

not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect upon the valuation. See Chicago, Burlnigton & Quincy R. R. Co. vs. Chicago, 166 U. S. 226, 249. The plaintiff in error was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was considerable enough to be a practical consideration and actually to influence prices. Boston Chamber of Commerce vs. Boston, 217 U. S. 189, 195. In estimating that probability the power of effecting the change by eminent domain must be left out. The principle is illustrated in an extreme form by the disallowance of the strategic value for improvements of the island in St. Mary's River in United States vs. Chandler-Dunbar Water Power Co.., ante p. 53. The plaintiff in error relies upon cases like Mississippi, etc., Boom Co. vs. Patterson, 98 U. S. 403, to sustain his position that while the valuation cannot be increased by the fact that his land has been taken for a water supply, still it can by the fact that the land is valuable for that purpose. The difficulties in the way of such evidence and the wide discretion allowed by the trial court are well brought

out in Sargent vs. Merrimac, 196 Massachusetts 171. Much depends on the circumstances of the particular case."

The Court cannot award damages to the plaintiff for a property right not owned by it and which is a matter of speculation as to whether or not the Land Company will or can ever acquire. As stated by the books, the condition of the Land Company acquiring the necessary property above that now owned by it, in order to round out its right to construct in excess of 28 feet, is too speculative and remote to be considered in determining the damages of the Land Company. That property cannot even be acquired by the Land Company by eminent domain because it is already devoted to public use. To permit such property to be taken into consideration would be to require the Railroad Company to pay to the Land Company for property which the Railroad Company now already owns.

There was no proof offered by the Land Company as to the value of the land except that it was of little worth except for power development. The power development of the property owned by the Land Company is not interfered with. The Court treated the $1000 agreed upon between the Railroad Company and the Sherar heirs as adequate compensation under the evidence, in the absence of any evidence to the contrary.

Mr. Martin (Trans. p. 190) testified that his company had sold one forty-acre tract which it

had acquired with the other property there and which had nothing to do with the hydro-electric development, for the sum of $200. This was undoubtedly the fair market value of the land itself. At the same rate the one thousand dollars allowed by the Court would represent the value of two hundred acres. Two hundred acres would give a right of way 200 feet wide and over 8 1-3 miles long. The right of way in this case over all of the property, including that held by the Interior Development Company and that acquired from the Government, would not exceed 3½ miles in length. Measured by the standard, therefore, of the Land Company's own sales in this immediate vicinity, the Land Company has been adequately compensated.

The Land Company asserts that the question of damage cannot be resolved upon this record and is seemingly dissatisfied with the testimony which it put in, and is now seemingly seeking to have this Court reconsider the question of damages. The Court will note from the record that the main contention and effort of the Land Company in this case on the trial was directed to proving the extent of its damages. It had practically abandoned the idea of removing the Railroad Company from the land and directed its attention to securing as heavy damages as possible. The Railroad Company objected to the Court going into the question of damages at all until the question of the rights of

the parties in the various lands had been determined, and all of the testimony of the Land Company on the question of such damage was introduced over the objection of the Railroad Company. In this connection, Mr. Walter S. Martin, as one of the Land Company's witnesses, was asked the following question (Trans. 189-190):

"Q. What total amount did your company expend in the acquisition of these lands?

A. Up to this time?

Q. Yes.

Mr. Wilson: I think that is immaterial.

The Court: Let him answer the question.

Mr. Veazie: I think, your Honor, the price paid for the land is always evidence affecting their value.

The Court: I think probably it is competent here, for this is not an action to condemn this property, and it may be necessary to ascertain the damages ultimately and include it for that purpose. You may answer the question, Mr. Martin."

And again, on page 193, the witness was asked:

"Q. State whether or not those lands also had availability owing to their location for railroad construction purposes, at the time you bought them—whether any railroad that might seek a water grade from the Columbia River to the Interior of Oregon would be likely to need this land for that purpose.

Mr. Wilson: I object to that. They are claim-

ing here that practically the sole injury in this case is the interference with their right to construct a power plant.

The Court: You can take the testimony and Mr. Wilson will save an exception."

Again, when Mr. Welch was on the stand (Trans. 234) he was asked the question:

"Q. I would ask you now to state to the best of your ability the market value of these lands, in view of all the capabilities they have for different uses?

Mr. Wilson: I object to that, your Honor, as immaterial and irrelevant to this controversy at this time.

The Court: He can answer the question."

Similar objections were made when the witness Thompson was attempting to testify to the value of the loss in power by reason of curtailment of the height of the dam, and the testimony was admitted. (Trans. 239-240.)

Again on pages 250 and 252 further objection was made. Witness Stillman, Trans. pp. 275 and 282, and witness Kyle, Trans. 299.

Notwithstanding these objections and the contention of the Railroad Company that the same was improper to be considered at the present hearing, the Court permitted the testimony to be taken and it was all taken for the very purpose of assessing the damages, and the Land Company cannot now be

heard to object to the same. If anyone had the right to so object it was the Railroad Company, who voiced its objection throughout the trial and not the Land Company.

Further contention is made that with reference to the damages, the Railroad Company has the burden of proof. We disagree as to this. The Land Company was the plaintiff. It alleged that its property was of great value and being damaged, and the damages were assessed under the decisions which hold to the effect that when a land owner stands by and permits a line to be constructed over his property, he is precluded from removing the line and is restricted to his action for damages, and in view of this restriction, the courts permitted the damages to be assessed in the injunction suit to prevent a multiplicity of actions. In an action for damages, therefore, under the circumstances, the burden of proof would be upon the plaintiff and we know of no reason why that burden should shift. The Land Company, under the burden of proof has failed to sustain the same, and we do not know of any reason why it should now be permitted to amend its position or retry the question because it is dissatisfied with the amount awarded.

"The general rule is that whoever has the affirmative of the issue as determined by the pleadings, and where there are no pleadings, by the nature of the investigation, has the burden of proof. It never shifts from that party either in civil or in

criminal cases. Where a party erroneously assumes the burden of the proof as to any particular allegation or the burden of evidence as to a particular fact, the mistake will not be corrected in the Appellate Court."

16 Cyc. 926.

In condemnation proceedings it is stated:

"The burden of showing necessity for public use is upon the petitioner. The burden of showing damages which the owner will suffer rests upon him."

15 Cyc. 898.
2 Lewis on Em. Dom. 3 Ed., Sec. 645.
Tanner v. Canal Co., (Utah) 121 Pac. 589.
Water Co. v. Frederick, 110 Pac. 137.
See also numerous cases cited in Cyc. and Lewis.

With reference to the contention that the issue of damages was raised first by the answer, we call attention to the allegations of paragraph 18 of the second amended complaint, particularly that contained on pages 38 and 39 of the Transcript, in which the Land Company attempts to set out at considerable length its damages and what they consist of. It is true that the answer requests the Court to determine the amount of damages in case it should hold that the defendant were not entitled to a dismissal of the suit, but the plaintiff alleges

its damages, assumed the burden of proof thereon from the start, it had the affirmative of the issue to establish said damages, and it would be contrary to reason to say that the Railroad Company had the burden of establishing the extent of the damage. The plaintiff having assumed the burden and failing to sustain the same, it certainly cannot now complain that the Court improperly assessed the damages because the *defendant* failed to prove that the damages were more than one thousand dollars.

VI.

The claim for damages in this case, if any exist, belongs to the predecessor in interest of the Land Company, rather than to the Land Company.

It is a well settled principle of law that where a railroad company unlawfully enters upon and constructs its line over the land of another, that the claim for damages on account of such unlawful entry is personal to the land owner at the time of the alleged unlawful entry, and does not run with the land, and any subsequent vendee of the owner of the land at the time of entry, takes the same subject to the burden of the railroad, such damages being in the nature of compensation for trespass, constituting a personal claim in favor of the owner at the time the entry occurred.

Roberts v. N. P. Ry. Co., 158 U. S. 1, 11.
Kindred v. U. P. R. R., 225 U. S. 582, 597.

Kakeldy v. Cal., etc., Ry. Co., 37 Wash. 675, 680.

Stone v. Waukegan, 205 Fed. 498.

At the time of the entry of the Railroad Company upon the land, the title to the same was held by the predecessors in interest of the Land Company. As far as the property is concerned, title to which was in the Interior Development Company, to-wit: Lot 1 of Section 3, Tp. 4 S. R. 14 E., and the Northeast Quarter of Southeast Quarter of Section 9, same township and range, there can be absolutely no doubt that the Land Company accepted title subject to the burden of the railroad thereover. The NE¼ of SE¼ of Sec. 9 was not transferred by the Interior Development Company to the Land Company until August 2, 1910, and Lot 1 of Section 3 was not transferred until April 4, 1914. At the time of entry of the railroad upon the land in question, the Interior Development Company was the absolute owner of this property, and under the principle of the cases just cited, there can be no doubt that the Land Company took title to this property subject to the burden of the railroad, which was constructed long prior to the transfer of the title to the Land Company.

It is claimed by the Land Company, however, that this principle cannot apply to the property acquired from the Sherar heirs, because of the outstanding option from the Sherar heirs held by Laughlin, and claimed to have been acquired by the

Land Company on August 5, 1909. The right of action for damages being personal to the land owner, it would have to be transferred in order to pass, irrespective of any outstanding option, and there was no proof in this case of any such assignment. Furthermore, the Land Company had not paid any money for the option on account of the purchase of the property until long after the entry of the railroad upon the land. In this regard, Mr. Martin, president of the Land Company testified (Trans. p. 203):

"Q. And did you take up with Mr. Morrow or anyone connected with the Des Chutes Railroad Company the fact that you were contemplating the purchase, and you didn't want them to treat with the Sherars?

A. I had bought the thing in August.

Q. In August, 1909. You hadn't paid any money at that time?

A. No, but we were under an obligation.

Q. What date in August?

A. Well, one contract was on the 5th, and the other contract on the 6th.

Q. You say they telephoned you that they were considering a right of way or the Des Chutes people wanted a right of way?

A. No, I don't know that it was the Des Chutes people.

Q. Well, that someone wanted a right of way?

A. One of the railroads had communicated with one of these representatives of this property, either

the Sherar interests of Laughlin or Simmons; it was communicated to me, I think, in San Francisco—I am not sure if it was here. What I said in reply to the thing was that if they do anything in regard to the right of way which damages the power value of that property, they do so at their own peril, and if they damage that property from the point of view of its power possibilities, we will feel free to retire from our contract.

Q. Now, Mr. Martin, the railroad was practically constructed there before you paid any money in December, 1909, was it not?

A. Oh, the railroad was doing all kinds of things there.

Q. I mean it had men on the work and the grade was practically completed at that time across the Sherar property?

A. Well, I don't suppose that I was bound to assume that a perfectly illegal and violation proposition of that sort was binding on me."

Mr. Martin by his testimony here shows that he conceived perfectly his legal rights in case anything was done by the owners of the land which he considered interfered with the power development. That is, he notified the owners that if anything was so done, he would feel free to cancel and retire from the purchase. He had not parted with one dollar in money, and the Sherars were still owners of the legal title. There was no obligation on Mr. Martin's part or that of the Eastern Oregon Land Com-

pany to go on with the purchase. It was in fact a simple option on which the Land Company had paid not one dollar. Mr. Martin's remedy was against the land owner, as he perfectly well knew, as shown by his testimony.

Under the authorities the right of action for damages against the Railroad Company, if any, existed in favor of the Sherar heirs and not in favor of the Land Company, and no assignment of such claim was shown nor did it in fact exist. However, the Railroad Company had agreed to pay the Sherar heirs one thousand dollars for the property, and it pleaded that it was ready, willing, and able to pay the same, and is willing to stand by what it supposed was its agreement in that regard, and while, as a matter of law, we submit that the Land Company has not the right to recover damages for the entry on the land, the Railroad Company is willing to and has paid that amount into court for the right of way in question, but the same was not demandable by the Land Company by legal right.

VII.

The Railroad Company has a right of way two hundred feet in width over the property, title to which was in the Government at the time of entry of the railroad thereon.

In the foregoing part of this brief we have discussed the rights of the parties on the assumption that the Sherar heirs were the owners of the N½ of SW¼ of Sec. 35, Tp. 3 S. R. 14 E., and Lot 2

of Sec. 3, Tp. 4 S. R. 14 E., and if the Court shall hold that said title having subsequently been acquired by the Land Company, related back so as to make the Land Company's rights prior to the Railroad Company's, then the decree should grant the right of way over this property as well as the balance of that held by the Land Company, as the sum paid is adequate to cover the same and should cover whatever rights the Land Company has in any of the property at this point.

However, we submit, that the Railroad Company's title over the two tracts in question, as acquired from the Government, is good as against the Land Company and should be prior thereto. The lower Court decreed that the Railroad Company was the owner of a right of way two hundred feet in width over and across this property, superior to any title in the Land Company. (Decree, Trans. p. 126.)

On the 27th day of January, 1906, this land was vacant public land of the United States, and on such date A. L. Veazie, on behalf of the Interior Development Company, filed a lieu selection thereon. (Stipulation, paragraph 8, Trans. 160.) Two weeks later, to-wit, on February 13, 1906, Joseph H. Sherar filed a contest of the Veazie selection and also filed an application to select this land himself. (Stipulation, paragraph 9, Trans. 160-1.) This contest was originally decided in favor of the Veazie selection, but later, on June 16, 1909 (Stipulation, paragraph 10, Trans. 161), was reversed. Prior to

the decision of this contest, however, these lands were all withdrawn from any form of disposition for irrigation works under the Act of June 17, 1902. (Stipulation, paragraph 12, Trans. 162.) This withdrawal was an absolute withdrawal against all forms of disposition. U. S. vs. Hansen (CCA 9th Circuit), 167 Fed. 881.

On November 5, 1908, the Board of Directors of the Railroad Company adopted its line of definite location over these lands, and on November 8th filed its profile thereover with the Register of the United States Land Office at The Dalles, Oregon, said company having previously, on February 9, 1906, filed certified copies of its articles of incorporation and due proofs of its organization under same with the Secretary of the Interior.

This profile was approved by the Secretary of Interior on June 10, 1910. (Stip., paragraphs 3, 4, 5, Trans. 157-8.) The withdrawals by the Secretary of the Interior from disposal of said lands were not cancelled until the 25th day of February, 1913, at which time patents to the said lands were issued on the Sherar lieu selection, but appended to said patents when issued was the following indorsement: "The lands above described are subject to all rights under an application by the Oregon Trunk Line, Inc., approved June 21, 1909, and an application by the Des Chutes Railroad Company, No. 01603, The Dalles, approved June 20, 1910, under the Act of March 3, 1875, being

applications for rights of way." (Stip., paragraphs 10 and 11, Trans. 161-2.)

It is now claimed by the Land Company that the decision of the lower Court in awarding the Railroad Company a right of way over these lands was based upon the decision of the Circuit Court, affirmed by this Court in the case of Daniels vs. Wagner, 205 Fed. 235, and that as said case has since been reversed by the United States Supreme Court, 237 U. S. 547, that part of the decree in this case should be reversed.

We submit, however, that such result does not follow, but that the present case is distinguishable from the Daniels case. In the Daniels case there was no withdrawal of lands from disposition but an arbitrary selection of one entryman over another, and the Court held that such arbitrary selection by one entryman over another was not permissible by the executive authority. In the present case the United States withdrew the lands from any form of disposal for irrigation works under the Act of June 17, 1902. This act provides, with reference to withdrawals of lands, as follows:

> "Section 3. That the Secretary of the Interior shall, before giving public notice provided for in Section 4 of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when in

his judgment such lands are not required for the purpose of this act."

7 Fed. Stat. Anno. 1099.

The act also provides for withdrawal except by homestead entry lands susceptible of irrigation.

This Court, in the case of U. S. vs. Hansen, 167 Fed. 885, interpreted this provision of the law as follows:

"Prior to the date of the reclamation act, the defendant in error had settled upon the land in controversy, intending to make a homestead entry thereon whenever it should be surveyed or offered for settlement. It has never been surveyed or offered for settlement and the question arises whether or not he had acquired such right thereto that it may not be withdrawn under Section 3. That section makes provision for two distinct classses of reservation of public lands for two distinct purposes. It provides, first, that the Secretary may withdraw from public entry such lands as are required for the actual occupation of the reclamation service. This is for such purposes as reservoirs, canals, pumping works, etc. No exception whatsoever is expressed as to lands which are authorized to be withdrawn for these purposes. It provides, second, for the withdrawal of any other public lands 'believed to be susceptible of irrigation from said works.'

> Such lands are to be withdrawn from entry 'except under a homestead law.' "

The withdrawal in this case was the absolute withdrawal for irrigation works. The withdrawal was made for the purpose of enabling the United States itself to construct irrigation works and not for the benefit of any other person. The Act of 1902, under which said withdrawals were made, was in effect at the time the selections were made by the Sherars and such selections were made subject to rights of the United States to withdraw at any time it determined to exercise its right of withdrawal. By the filing of lieu selections Sherars acquired no vested interest in the lands as against the United States,

> Cosmos Exploration Co. vs. Gray Eagle Oil Co., 190 U. S. 301, 311.

And by such withdrawals all proceedings to select the land were at an end.

In the case of Frisbie vs. Whitney, 9 Wallace 187, it is held in the case of a pre-emptioner that occupation and improvement of public lands under pre-emption laws created no vested right in the occupant as against the United States, and that until a complete equitable title is acquired, it is within the legal and constitutional competence of Congress to withdraw the land from entry and sale although this may defeat the imperfect right of the settler.

In the Yosemite Valley case, 15 Wallace 93, the United States Supreme Court again affirmed the decision in the Frisbie vs. Whitney case, and held that the Government had the right to withdraw these lands from sale and grant them to the State of California for park purposes, and that such pre-emption settler had no vested interest in the property which the Government was bound to recognize.

Similar holding was again made by the Supreme Court of the United States in the case of

Campbell v. Wade, 132 U. S. 34.

This latter case was one in which the State of Texas had passed an act for the sale of a portion of the vacant and unappropriated public lands within that state. The petitioner made application for a right to purchase under the state law. He had complied with the provisions of the law as far as it was possible for him to comply. Before, however, the survey was made, the state passed an act withdrawing from sale all the public lands in question and the Supreme Court held that the applicant had no vested right under his application to purchase as against the state, and such withdrawal could be made irrespective of such application. So this Court had held with reference to the reclamation act, the identical act under which the withdrawals were made in the present case, in the case of United States vs. Hansen, 167 Fed. 881. There-

fore, when the Government withdrew the lands from entry and sale, as stated by the Supreme Court, it "put an end to proceedings instituted for their acquisition."

Campbell v. Wade, 132 U. S. 37.

After these withdrawals the lands stood as if no application to purchase had been made. These withdrawals remained in effect for seven years as to one of the tracts and for five years as to the other. During this period the Government approved the map of location of the Railroad Company, which it had a right to do, under the Act of Congress approved March 3, 1899, 30 Stat. 1233, where it is provided:

> "That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway, over and across any forest reservation or reservoir site, when in his judgment the public interests will not be injuriously affected thereby."

This was a reservoir site and the Government determined that the height of the line was sufficient to protect its interests and the public interests and the public interests would not be injuriously affected thereby, and approved the map as it had authority to do under this act of Congress, and the effect thereof was to grant the Railroad Company the right of way.

Three years later, when the Government determined that it would not need these lands for its reclamation project, it cancelled the withdrawals and patented the lands to the Sherar heirs. In issuing the patent, however, it issued the same with the endorsement that the same was subject to the right of way of the Des Chutes Railroad Company, under the approval of its map June 20, 1910. Under such circumstances, therefore, we submit that the withdrawal of the lands from entry and sale cancelled the applications to purchase, and the approval of the map of the Railroad Company during the time of such withdrawal was under authority of law and granted to the Railroad Company the right of way two hundred feet in width.

VIII.

The court erred in granting the costs of this proceeding to the Land Company and against the Railroad Company.

On the main part of this brief, the Land Company was the appellant. Upon being served with the appeal of the Land Company the Railroad Company filed a cross appeal, appealing from that portion of the decree which adjudged that the Land Company was entitled to recover its costs against the Railroad Company.

As specification of error the Railroad Company asserts:

1. That the United States District Court for

the District of Oregon erred in adjudging and decreeing that the complainant have and recover of defendant costs and disbursements incurred by the complainant in said cause.

2. That the said Court erred in not adjudging and decreeing that the defendant have and recover from the complainant the costs and disbursements incurred by said defendant in said cause.

3. That the Court erred in treating said action as a condemnation suit and in holding and deciding that inasmuch as defendant made no tender to cover the damages prior to the commencement of the suit, complainant was entitled to recover its costs and disbursements under Section 6868 L. O. L.

4. That the said Court erred in decreeing and adjudging costs to complainant and against defendant as a matter of law under and by virtue of Section 6868 L. O. L.

5. That it was an abuse of discretion on the part of the Court to decree and adjudge costs in this case in favor of complainant and against defendant in that this was a suit for an injunction to restrain the defendant from operating its railroad over said lands claimed to be owned by complainant. That as to all but a small portion of said lands, said title was disputed by defendant and the title claimed by the defendant, and that as to all of the lands, title to which was disputed, the decision of the Court was in favor of the defendant

and against the complainant, and that it was an abuse of the Court's discretion to decree costs to the complainant and against the defendant as to all of the lands, title to which the Court found to be in the defendant.

The opinion of the Court with reference to costs is short and is as follows: "Fourth: That as defendant made no tender to cover the damages prior to the commencement of the suit, complainant should have judgment for its costs and disbursements. (Section 6868, Lord's Oregon Laws, 1; 15 Cyc. 1015.)"

Section 6868, Lord's Oregon Laws, is one of the provisions of the code with reference to the condemnation of land. It provides: "The costs and disbursements of the defendant shall be taxed by the clerk and recovered off the corporation, but if it appear that such corporation tendered the defendant before commencing the action an amount equal to or greater than that assessed by the jury in such case, the corporation shall recover its costs and disbursements off the defendant." It will be seen, therefore, that the Court treated this as a condemnation case and granted the costs to the Land Company on such a basis, and as a matter of right.

The Court was in error, we submit, in this, as this was not a condemnation case, but was a suit for an injunction to remove the Railroad Company from the land. As to this relief sought, the decision was against the Land Company and in favor of the Rail-

road Company. Furthermore, as to that land acquired from the Interior Development Company, and that part title to which was in the Government at the time of the commencement of this action, the decision was in favor of the Railroad Company and against the Land Company. Certainly as to these tracts of land the costs should not be recovered by the Land Company, but the Railroad Company should have recovered costs. Furthermore, as to the balance of this land, title to which was acknowledged to be in the Land Company, the Railroad Company in its first pleading offered to pay to the Land Company the sum of $1,000. It was pleaded that it had an agreement to pay such sum to the Land Company, and was ready, willing and able to pay the said amount. The Land Company refused to accept this, and certainly any costs incurred after the refusal of the Land Company to accept this amount, such costs should not be recovered against the Railroad Company.

As above stated, this was not an action to condemn the property, but a suit for an injunction, and in such cases, where the railroad company has gone on the land with the acquiescence of the land owner, the said land owner is precluded from removing the railroad company, and is relegated, under the authorities, to an action for damages.

Instead of requiring the land owner to institute a separate action for damages, the Court permits the damages to be assessed in the same proceedings. (Andrus v. Power Co., 147 Fed. 76.) This proce-

dure does not partake of the circumstances contemplated in Section 6868, where the railroad company institutes a proceeding and has the opportunity to make a tender prior to commencing the condemnation proceeding.

In this case, however, the land owner, after the Railroad Company had considered everything settled, and without any warning to the Railroad Company, commenced a proceeding. Under such circumstances the Railroad Company had no opportunity to make a tender prior to the commencement of the proceeding. It should therefore not be mulcted in costs by the Court, under the statute in question.

The court of equity has a judicial discretion with reference to the allowance of costs.

Trustees v. Greenough, 105 U. S. 527.
In re. Mich. Central R. R. Co., 124 Fed. 731.

The court of equity ordinarily follows the law in the matter of costs, and certainly, as to that part of the case in which the Court held the title of the Railroad Company superior to that of the Land Company, no costs should be allowed the Land Company, but should be allowed to the Railroad Company, and as to the balance of the lands, the Railroad Company having offered to pay the sum of $1,000, and the testimony showing that the Land Company knew that said sum had been offered at all times, it should not be permitted to refuse to accept said sum and then require the Railroad Company to pay the costs of this proceeding.

We submit that the Court erred in giving the costs to the Land Company as a matter of right under the statutes of Oregon with reference to condemnation proceedings.

References to Plaintiff's Brief

At the time of the preparation of the foregoing brief, we had only been furnished with typewritten notes of the plaintiff's brief. We have now received copies of the plaintiff's brief and desire to call attention to one or two things.

1. The map inserted between pages 2 and 3 of the brief was not an exhibit in the case and does not accurately show the location of the river. The same is more accurately shown on Defendant's Exhibit C, and it is in evidence that the proposed dam would have to be attached to Lot 1 of Sec. 3, Tp. 4 S. R. 14 E., which was at the time of the entry the property of the Interior Development Company.

2. On page 2 of complainant's brief, the statement is made with reference to the lands, title to which was in the United States at the time of the commencement of this action, that under the opinion of the First Assistant Secretary of the Interior in a contest between Sherar and the Interior Development Company before the Land Department, it was shown that the property had been in the *bona fide* occupancy of Sherar from 1871. The opinion of the First Assistant Secretary was not

substantive evidence in this case of the facts stated in said opinion. The defendant in this case was not a party to that proceeding, and at the time the opinion was introduced as evidence, it was objected to. (Stipulation paragraph 10, Trans. 161.) The Des Chutes Railroad Company was not a party to that contest and the opinion is not substantive evidence of the facts referred to. As a matter of fact, the land could not lawfully have been in the *bona fide* possession of Sherar from the year 1871 because he had taken up a homestead and had exhausted his right in that regard, and it is not claimed that he had ever made any entry or taken any proceedings to legally acquire the same. Furthermore, this contention was abandoned by the complainant because it stipulates that on the 27th day of January, 1906, the north half of the southwest quarter of section 35, township 3 S. R. 14 E. W. M., and lot 2 and the southeast quarter of the northwest quarter of section 3, township 4 S. R. 14 E. W. M., were *vacant* public lands of the United States. (Stip. paragraph 8, Trans. 160.)

3. On page 4 the statement that on August 5, 1909, the Eastern Oregon Land Company acquired from Laughlin the option on the Sherar property, paying therefor $23,000 cash and undertaking to pay the further sum of $27,000, is certainly misleading. While it is true the assignment of the option was made on August 5, 1909, no money whatever was transferred then nor was any money whatever paid by the Land Company until after

the first of December. (Testimony of Martin, Trans. 184, 203, 204.)

4. The further statement on the same page that in December of the same year it acquired the adjacent property of the Interior Development Company for $20,000, is likewise misleading. The Land Company did not acquire the properties of the Interior Development Company at that time, but acquired the stock of the Interior Development Company. The property still remained in the Interior Development Company until long after, the forty acre tract in section 9 being transferred on August 2, 1910, and the piece right at the dam site was not transferred until April 4, 1914 (Stipulation paragraph 19, Trans. 171), about one week prior to the trial of this case.

5. On page 5 the statement is attributed to Mr. Kyle that the value of the land in question had been depreciated $75,000 by the construction of defendant's railroad. This statement, however, was made by Mr. Kyle on the assumption that the Land Company had full right to construct as high as it desired. This testimony should be taken in connection with his cross-examination where he testifies as follows:

"Q. But if it should develop that the Sherar estate hasn't the right to the dam site, what difference would it make in your estimate?

A. Well, if they have no right to build there, it would not be of much value. *My estimate is based*

upon the fact that the Eastern Oregon Land Company had complete right to construct. I assume that they can condemn the property. They would have to pay whatever it cost to get the property.

Q. Now, if it should also develop that they have no rights up the river, south of the south line of the NE¼ of SE¼ of Sec. 9, Tp. 4 S. R. 14 E., and could not acquire any, do you consider that their property was made less valuable by reason of the present location of the DesChutes Railroad Company than if it were four and one-half feet higher?

A. If it is a fact that they have no right to acquire the property or condemn it, it would not.

Q. If the complainant in this case has no rights south of the south line of the NE¼ of SE¼ of Sec. 9, Tp. 4 S. R. 14 E., and can acquire no rights there above that point, how much less valuable is that property of the Sherars for power purposes at the present location of the DesChutes Railroad Company than if their line were four and one-half feet higher?

A. If it is a fact that they have no rights and can acquire no rights up there, it would not affect it."

(Trans. pages 303 and 304.)

6. On page 15 it is stated that the ties and rails were not laid until October 10, and there was no railroad in evidence on the land at the time this suit was commenced or at any time prior to October 10th. The inference from this is that the rail-

road had not been constructed within the contemplation of the law prior to the commencement of this suit. The damage, however, under the authorities cited in our main brief, takes effect as of the date of the entry. Moreover, the grading was practically completed. The ties and rails were not laid nor the bridges constructed. This, however, within the contemplation of the law, is the construction of the line for the purpose of determining adverse rights.

Johnson v. Spokane International Railway Co., 137 Pac. 894.
N. P. v. Borlaw, 143 N. W. 903.

7. The statement on page 18 that Owre, the engineer in charge of the construction, declared in December, 1909, that it was not apparent at the dam site where the grade would be located, is misleading. What he says is that right opposite the dam site he didn't think it was apparent, but 500 feet above and extending for a distance of perhaps eleven or twelve hundred feet the grade was practically completed. However, Mr. Boschke, testifying with the progress profile before him, which showed the progress of the work, testified:

"Q. How soon was it, Mr. Boschke, that an examination of the grounds would disclose the grade at which the line was to be constructed?

A. Well, the grading at Mile Post 44, 1000 feet in there, was about completed in August, 1909, and

right at the dam site the grade was completed—well, I don't say was completed, but it was laid out there so you could see where the grade was in October and November, 1909. That was right practically at the dam site; either side of that; in fact, the grade all along there was marked out so you could readily see at what height the grade would be." (Trans. p. 332.)

Mr. Brandon, the engineer in charge, testified:

"By the end of September, 1909, I should say the grade of the line was pretty well defined in places on the ground so that anyone in the vicinity could ascertain approximately where the line was to be, or the elevation where the line was to be constructed." (Trans. p. 419.)

8. On page 39 it is asserted that the Railroad Company could acquire no right of way over lands reserved under the Act of March 30, 1875. The complainant, however, overlooks the Act of Congress approved March 3, 1899, 12 Stat. 1233, which provides:

"That in the form provided by existing law, the Secretary of the Interior may file and approve surveys and plats of any rights of way for any wagon road, railroad, or other highway, over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby."

9. From pages 42 to 52 complainant seeks to

avoid the burden cast upon it by the negotiations between the Railroad Company and Laughlin, and on page 52 it is stated that the defendant took no steps in execution of the agreement until after it knew the plaintiff had acquired Laughlin's interests.

The complainant is mistaken in this because immediately after the interview between Laughlin and the railroad officials, the survey was re-run. A re-survey of the line on the side of the canyon for a distance of approximately seven miles requires the expenditure of considerable money. This was made in direct compliance with the interview between Laughlin and the railroad officials, and the assertion that the Railroad Company took no step in the execution of the agreement until after it knew that the plaintiff had acquired Laughlin's interest, is erroneous. The survey was completed long before the Land Company acquired the option, which was in August, 1909.

10. On page 60 of the brief it is stated that it is apparent in view of this testimony, and there is no other testimony in the record relating to any transaction between the railroad and Sherar's executors, the Railroad Company has not sustained its case. It is apparent here, and throughout the entire brief of complainant, that it is going on the assumption that the Railroad Company in this case has the burden of proof throughout, whereas the Land Company was the plaintiff and, of course,

should be required to sustain its case rather than the Railroad Company.

The foregoing are only a few of the points on which complainant draws a distorted meaning from an isolated expression of a witness without taking into consideration all of the testimony on any particular point.

We therefore submit, with reference to this case, that the decision of the lower Court should in all respects be affirmed with the exception of its allowance of costs, and that said part of the decree should be reversed and the Railroad Company be granted its costs against the Land Company, or, if for any cause the Court should consider this improper, then the same should be apportioned so as to grant to the Railroad Company its costs with reference to that part of the case in which the title of the Railroad Company was held superior and no condemnation necessary.

Respectfully submitted,

A. C. SPENCER,
W. A. ROBBINS,
JAMES G. WILSON,
Solicitor for Appellee and Cross-Appellant Des Chutes Railroad Company.

No. 2814

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EASTERN OREGON LAND COMPANY, a corporation,

Appellant,

vs.

DESCHUTES RAILROAD COMPANY, a corporation,

Appellee.

DESCHUTES RAILROAD COMPANY, a corporation,

Appellant,

vs.

EASTERN OREGON LAND COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF

VEAZIE, McCOURT & VEAZIE,
CHARLES S. WHEELER and
JOHN F. BOWIE,

Solicitors for Appellant.

JOHN F. BOWIE,
Counsel.

Filed this —— day of November, 1916.

F. D. MONCKTON, Clerk,

By.....Deputy.

GLASS & PRUDHOMME CO., PORTLAND, OREGON 128911

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Appellee.

APPELLANT'S REPLY BRIEF.

We believe the court is more concerned with the facts and the real merits of the controversy, than it is with consideration of claims that inconsistent theories have been advanced in the pleadings. When the suit was filed, there was no railroad on the land—nothing but a grade, without ties, rails or bridges. (Brandon's Testimony, p. 423.) The relief asked was an injunction. In connection with the preliminary hearing, the fact came to light that plaintiff's predecessors in inter-

est had had certain dealings with the railroad company, from which a license to go on and construct the road was asserted. These predecessors of the plaintiff had specified on their part, that the defendant company should provide for and protect the hydraulic possibilities of the site—in other words, should not constitute itself an obstacle to the development of the power project. To this proposal the railroad company appeared to have agreed, to the extent of promising to provide for the construction of a 60-foot dam. The court denied the preliminary injunction and held the case for such relief as might appear proper on the final hearing.

We shall refer later in some detail to the evidence which goes to establish beyond question that the railroad company did enter on the land under just such an understanding with plaintiff's predecessors. This point is fully developed in our opening brief. What we wish to have carefully noted now is, that the decree as entered below *gives plaintiff no right to build a dam of any specified height whatever on its land,* but leaves the plaintiff at the mercy of the railroad company, which is here in court contending that the plaintiff, at any rate as against it, has no right to build a dam in excess of 28 feet, and, even then, must build at the peril of causing injury to the fills and embankments constituting a part of the roadbed of the railroad and of being held responsible therefor, *with no obligation imposed on the railroad company to protect its own works in case any dam is built.* This, we say, is an intolerable condition, whereby one of the most valuable water powers in the Pacific Northwest is rendered practically worthless.

TERMS OF THE DECREE BELOW.

If the court will kindly turn to page 126 of the abstract and note the decree that was entered below, it will be found that all rights granted to the plaintiff to erect a dam and maintain hydraulic works, are conditioned that the plaintiff must not flood *or damage* the track *or roadbed* of the defendant; and on page 129 the decree provides that the defendant is granted the right to maintain its railroad over the lands described and as now located, "*together with necessary cuts, slopes and safe supports therefor,* and the right to maintain and operate its trains thereover without interference on the part of plaintiff * * * in any manner whatsoever, except as permitted by this degree."

It may be possible that a dam approximating 60 feet in height could be built and maintained without flooding defendant's *track;* but its *roadbed,* which we may not flood, including its slopes and fills, which we are enjoined from interfering with or damaging, extend down far below the flood line of a 60-foot dam; and they are *admittedly liable to damage* by the construction of any such a dam.

PERIL TO ROADBED.

We desire to call attention to some of the testimony bearing on that point; the page references being to the pages of the printed transcript.

Mr. Kyle, one of the most experienced railroad engineers of the country, who built the North Bank Road

and is very familiar with the situation on the river, testifies (p. 295):

> "I have examined the roadbed of the Deschutes Railroad Company at and above the dam site. I would not think that it would be safe to construct a dam at that point 60 feet in height with the railroad constructed as it is, unless we used a great deal of rip-rap on the present banks, at least. If you put in plenty of rip-rap there, I think the danger would be slight. Of course, it might cave out in a few places where the rocks are of volcanic ash—in fact, it is nearly all volcanic ash for a short distance, but that could be rip-rapped, I suppose, and made perfectly safe. Volcanic ash is very light and very easily disintegrated when flooded. Water, I should say, would have a tendency to make it flow—make it flow very easily, move out of place."

Being recalled later, on cross-examination, Mr. Kyle testified (p. 494) as follows:

> "Q. Mr. Kyle, if the problem were presented to you to go up there and construct a dam 60 feet high, so as to maintain that water at the elevation and take care of the flood waters, with the lines as they are today, would you consider it an insurmountable problem?
>
> A. Well, I wouldn't want—I don't believe I would want to take the chances of building a dam there, if I had to stand the damages.

> You might construct a plant there that would operate and again you might have a lot of additional expense; that is, damages and so on. When a person actually has to take his chance, sometimes he will, but I don't think it is right to make a person take that chance when it is not absolutely necessary."

It appears from the testimony of Mr. Thompson (p. 243), that at the dam site the roadbed is a fill, the outer edge of which is built upon an old wagon road which was built up with a pile of rocks and bound together with sagebrush; that above the dam, the roadbed is in some places in open cuts; some places in through cuts, and some places built up of fills on rocky bluffs; that the ground consists of volcanic ash; that in places along the roadway, the grade is built on top of light volcanic ash.

Mr. Thompson's testimony continues (p. 244), as follows:

> "If a dam sixty feet in height were constructed at any of the dam sites under consideration above the falls in the river, the roadbed would be overflowed at times of high water, that is, basing on the maximum of 30,000 feet discharge. In my opinion as an engineer, after having inspected that roadbed, I would consider that if a sixty-foot dam should be constructed there, certain portions of the roadbed would be in hazard at all times. On other parts of the track, the grade might stay in.

> The effect of the inundation of those tracks and the rising and subsiding of the waters over them would be that in many cases the tracks or grades would slough out into the pond with the rise and fall of the pond. If the river should rise to a stage of 60,000 second feet, a good deal of track would be washed out and all of it would be submerged."

Mr. Dillman testifies (p. 277) that the railroad would be endangered by building a dam so high as to flood the track; and that a dam would soften the banks and possibly injure the road in that way; but that if the fills should be rip-rapped, witness thinks it would be safe, though the fact might develop otherwise.

Taking up now the testimony of the engineers for the defendant, we find that Mr. Boschke, at page 341, admits that a part of the line above the damsite would be flooded if a dam were built at that point, 60 feet in height; but, notwithstanding this, Mr. Boschke declares his opinion to be (pp. 341-342) that a dam might be constructed at the damsite 60 feet in height, and the railroad still be safely maintained, by *rip-rapping; and by building a retaining wall opposite that part of the railroad at and for a few hundred feet south of the demsite to keep out the water.*

On page 339, Mr. Boschke says:

> "I think a dam readily could be built there 60 feet or over, without flooding our track or right of way so as to interfere with our railroad, if the flood waters were properly taken care of.

Q. Why weren't you building your road so as to guard against flood waters?

A. As I said before, my object was to build a railroad there, and I was ordered to build it as high as I could, going up the maximum grade from the tunnel, and there wasn't any dam built there at that time, and there isn't today. In my opinion, though, a dam could be built there 60 feet, and probably would be all right, *except might flood our slopes, and in that way soften them up and injure the railroad, where the slopes run down into the river.*"

On page 341, he states that some of the fills run down below the grade line five, ten, fifteen to *twenty-five feet on the center line and possibly more out on the slope.*

The meaning of the word "roadbed" has been before the courts in several cases.

The term roadbed is of plain import. It signifies the bed or foundation upon which rests the superstructure of rails and sleepers.

Santa Clara Co. v. S. P. R., 118 U. S. 413.
S. F. & N. P. R. Co. v. State Board, 60 Cal. 34.
S. F. R. Co. v. Stockton, 149 Cal. 90.

In re Belvidere Del. R. c. 75 N. J. Law 386.

In State v. Hannibal & St. Joe R. Co., 135 Mo. 637, the term "roadbed" is construed to mean, as used in a taxing act there under consideration, not merely on

foundation upon which the superstructure of ties, rails, and so forth, rests, but to include also the roadway or right of way.

The roadbed includes all that is necessary to support the superstructure.

> Osgood v. U. S. Health & Ac. Ins. Co., 76 N. H. 475; 84 A. 51, Ann. Cas. 1913 C. 425.

In McClure v. Great Western Association, 133 Iowa, 224; 110 N. W. 466, 8 L. R. A. N. S. 970, 119 A. S. R. 598, 12 Ann Cas. 41, the court says:

> "We quite agree that the term 'roadbed' does not of necessity include the entire right of way. From the standpoint of engineering it is the bed or foundation on which the superstructure of ties and rails is made to rest. This is the definition common to all the authorities. Webster's Inter. Dictionary; Century Dictionary; 7 Words & Phrases 6255. If, now, the superstructure be placed upon the natural surface of the ground, or perhaps at the bottom of a cut, it would seem reasonable to say that in strictness the roadbed extended no further outward than the respective lines marked by the ends of the ties. If, on the other hand, the superstructure is placed on a grade, or raised surface, it seems clear that the term must be held to include all portions of the superstructure, from base line to base line, or, at least, so far as designed to serve the purpose in view. This must be so because the term nat-

> urally implies a condition not of undisturbed nature, but resulting from the constructive work of human hands guided by a specific purpose. * * *
>
> Now, as constructed, an embankment forming a roadbed may in fact extend to the limits of the right of way, or it may happen that the ties and rails are laid at the bottom of a cut or on the natural surface of the ground simply made smooth for that purpose."

Defendant's engineer Owre testifies at page 408, that there are quite a number of fills along the road there, from the damsite to the head of the pondage that would be caused by a sixty-foot dam, but that the fills are not very deep at that point, with the exception of one or two, and that from the damsite north, and for a distance of possibly 500 feet going south, the railroad's fills or embankments extend down on to the roadbed of the old Shaniko Road; that the wagon road north of the damsite was largely built up with loose rock, and that south of the damsite, it was largely of earth construction.

On direct examination, defendant's engineer Brandon, who is not a hydraulic engineer (p. 421), testified on this point, as follows:

> "Q. Is the present location and elevation of the Deschutes Railroad at the so-called damsite such as will permit, as a practical engineering matter, of the construction, maintenance and use of a power dam in the Deschutes River, to an elevation of 60 feet above low water in the river?

A. Yes. There will be about 4½ feet leeway between such an elevation and the sub-grade of our line. This difference will increase about 1¼ feet between that point and a point 200 or 300 feet above the dam site.

Q. Will that distance, in your opinion, be sufficient, or is it practical, to take care of the flood waters of the Deschutes River within that difference?

A. *I can only say I think so,* for the reason that I did not make any surveys to determine how much area would be required at the top of the dam there for that, and it is necessary to obtain slopes, to take care of abruptness, and everything else."

Defendant's engineer Brandon says on cross-examination (p. 427) that the railroad, over a portion of the distance involved, is built on embankments; that a good deal of the material is loose rock mixed with volcanic ash soil, which character of soil does not possess firmness under the action of water, unless it is very well protected; *and that it is not protected now in any way.*

The foregoing extracts from the testimony make it clear, that by the decree the plaintiff is practically *enjoined from making any use of its power site.* Plaintiff has no right to rip-rap the railroad embankments, nor to undertake the reconstruction of any portion not safely built to withstand submersion; nor ought plaintiff to be under the least obligation to do these things. Yet it

appears that within the area to be submerged, there are fills of soft and easily disintegrated material, running down as much as 25 feet on the center line, and necessarily much further on the outer slope, which would be imperilled by flooding, at least unless rip-rapped and properly taken care of. Yet plaintiff is enjoined by the decree from building any dam or doing anything on the premises which will flood or damage defendant's roadbed or interfere with the railroad company's "slopes and safe supports therefor," without any obligation being imposed on the railroad company to do anything more than it has already done to protect itself. Our contention is that the railroad company, having agreed to build so as to permit the construction of a 60-foot dam, ought to be compelled to take all necessary measures to protect its own roadway in case such a dam is built and assume the risk involved; and that the plaintiff ought to be decreed the affirmative right to construct a dam to such a height, without liability to the railroad company for anything that happens because thereof. As to whether or not a 60-foot dam could be built at all without imperilling the railroad, even with proper precautions on the railroad company's part, there is some difference of opinion among the engineers. It is probably not necessary to review that testimony fully. Some of it appears in the extracts we have quoted above. It may fairly be said that the engineer witnesses for the plaintiff, who are men of such eminence in their profession that their opinions are entitled to great weight, agree that there is an element of risk of damage to the railroad, which is a very material factor in depreciating the value of the power site, if the plaintiff company is to assume that

risk. We call attention to the testimony of the different witnesses: Thompson (p. 252), Dillman (p. 277), Kyle (p. 294), and Richardson (p. 596).

On the other hand, the engineer witnesses for the defendant expressed the opinion, as appears in the extracts we have given above and in other places, that a dam 60 feet high can be built and the railroad can still safely be maintained by rip-rapping and by constructing a retaining wall opposite that part of the railroad tracks near the damsite and for a few hundred feet south, and provided special means are adopted to take care of the flood waters. See the testimony of Boschke (p. 342); Brandon (pp. 422-426).

An exceedingly important point which must not be overlooked is, that the defendant's engineer witnesses concede that if a 60-foot dam is built, it will be necessary to install some special means of taking care of the flood waters. The defendant's chief engineer, Boschke, says (p. 339):

> "I think a dam readily could be built there 60 feet or over without flooding our track or right of way so as to interfere with our railroad, *if the flood waters were properly taken care of.*"

Defendant's engineer Brandon admits, at p. 426, that such a flooding of the railroad as would occur by the construction of a 60-foot dam would be highly dangerous. Defendant's engineer Wickersham testifies, at p. 429, that it would be necessary to provide some method of taking care of the flood waters; and on cross-examination this witness testifies (p. 443):

"A. Now, as I understand you, it would be necessary to provide some way of taking care of that water, if a 60-foot dam were to be installed at that point?

A. Yes, sir.

Q. It is not practicable, then, to build the 60-foot dam at the point in controversy, as that railroad now stands, without providing some special method of taking care of flood waters, is it?

A. Flood waters should be taken care of.

Q. They will have to be taken care of by some special method or else a 60-foot dam cannot be built?

A. Yes, sir."

Defendant's engineer witness Kelly testifies (pp. 458, et seq.) that a 60-foot dam could be built without interfering with the defendant's railroad "with a properly designed spillway, that is, a spillway that would take care of the flood flow." This witness then promulgated his siphon plan of spillway.

The expedient of flash boards was also suggested by the defendant. We think little attention need be given to that suggestion, in view of the unanimity with which the engineers on whose advice the plaintiff must rely have condemned it; the evident fact that they are a device for increasing low-water head, and not for control of high water flow; the failure of the defendant to show that they are ever used for controlling flood waters, or

on such a large scale as would here be necessary, and the evident risk and expense involved.

The plans prepared by J. G. White & Company contemplate an open 450-foot spillway or weir, of substantially the length of the dam, by which the flood-waters would pass over the top of the dam; which is the ordinary method. It is undisputed in this case, that in engineering parlance a 60-foot dam means a dam with masonry crest 60 feet above low water. Engineers Thompson and Whistler so testify, and we believe there is no contradiction.

We submit that in all fairness, if the railroad company has not built its line (as admittedly it has not) so as to allow room for the flood waters safely to pass when a 60-foot dam of the ordinary type is built, then the decree ought to provide that when a dam is built, the railroad company shall either make its line safe by raising it and doing whatever else is necessary; or otherwise the railroad company should bear the expense that may be necessary to install any special form of siphon or other unusual type of spillway, and should take any risk of its failure to operate with safety.

REVIEW OF RESPONDENT'S BRIEF.

I.

The first division of respondent's brief is devoted to the proposition that the relief sought by the plaintiff cannot be granted, by reason of the failure of the land company to object to the construction of the railroad over

the Sherar land, when it learned that said road was being so constructed. When this portion of the argument is examined, it is found to mean that the plaintiff cannot now have an injunction preventing the railroad company from maintaining or operating its railroad over and across the plaintiff's lands. This we consider irrelevant to the case as it now stands. The lower court having allowed the railroad to be completed pending the litigation, denied an injunction, which course may have been within its discretion. It is, however, well established that where the Court refuses an injunction, it may hold jurisdiction for the purpose of awarding other adequate relief, and, in a proper case, it is the duty of the court to do so.

Cowan v. So. Ry. Co., 118 Ala. 554, 23 So. 754.

New York v. Pine, 185 U. S. 93, 22 S. Ct. 592.

Duncan v. Nassau El. Ry. Co., 111 N. Y. S. 210.

Calway v. Met. El. R. Co., 128 N. Y. 132, 28 N. E. 479.

Papponheim v. Met. El. R. R. Co., 128 N. Y. 436, 28 N. E. 518.

Shepard v. Manhattan R. Co., 117 N. Y. 422, 23 N. E. 30.

Lynch v. Met. Ry. Co., 129 N. Y. 274, 29 N. E. 315.

Bohm v. Met. Ry. Co., 129 N. Y. 576, 29 N. E. 802.

Kernochan v. Manhattan Ry. Co., 161 N. Y. 339, 55 N. E. 906.

Knoth v. Met. R. Co., 187 N. Y. 243.

Lucas v. Ashland Light M. & P. Co., 138 N. W. 761 (Neb.).

O. R. & N. Co. v. McDonald, 58 Ore. 236, 112 Pac. 413, 32 L. R. A. (New Series) 117.

The case last cited was carried to the United States Supreme Court and affirmed.

McDonald v. O. R. & N. Co., 34 Supreme Court Rep. 772, 233 U. S. 665.

II.

The second division of respondent's brief is devoted to the argument of the proposition that the Land Company did not acquire the property under representations that it had a right to construct a dam 60 feet high. If this be true, defendant is a trespasser, and the testimony of the defendant's witnesses must be disregarded. We do not understand this to be a vital issue in the case. Our contention is that the Railroad Company entered on the land with the understanding with plaintiff's predecessors in interest that it would protect the hydraulic possibilities of the site, at least to the extent of the right and opportunity to erect a sixty foot dam. The evidence to this effect is so overwhelming, that it is not disputed that the Railroad Company had agreed with plaintiff's predecessors in interest so to locate its road as to permit the construction of a sixty-foot dam. This point is argued fully in the opening brief of the appel-

lant, and it is not necessary to discuss it at length here. Briefly stated, the two points are:

> "(a) Did the Railroad Company enter on the land with the understanding between itself and plaintiff's predecessors that it should build so as not to interfere with the hydraulic possibilities of the site?
>
> (b) If so, how far did it agree to go in the protection of the dam and flowage right?"

We say that the plain answer to the first question is yes, and that the Railroad Company agreed to protect the site to the extent of permitting a 60-foot dam to be built. Laughlin (pp. 518-519); Welch (p. 234); Huntington (p. 174 and Huntington's letter, Plaintiff's Exhibit 29, and p. 175); Grimes (pp. 547-548); all testify that their proposal in response to the request of the Railroad Company for leave to build across the land was, that the Railroad Company might do so, provided it would protect the water power. The testimony of defendant's witnesses shows that in response to this proposal and requirement that the Railroad Company must protect the water power in case it was given leave to build, the Railroad Company agreed to protect the water power to the extent of permitting a 60-foot dam to be built, and that defendant entered on the land with that understanding. See the testimony of Morrow (pp. 360-368), and of Boschke (pp. 334-336).

Here is no conflict of testimony, but plain harmony. The Railroad Company, having got into possession on such an understanding, says now that it will protect no

hydraulic possibilities at all, and will permit no dam to be built that softens any of its slopes or floods any of the margins of its right of way.

III.

The third division of respondent's brief is devoted to the argument that the Interior Development Company owned the only water appropriation on the river; and, inasmuch as it is alleged that the president of that company acquiesced in the construction of the road at the height where it was built, on the understanding that he could erect a 60-foot dam, therefore the plaintiff, as present owner of this water right, cannot question the decree that was entered in this case.

Notwithstanding this alleged agreement with Mr. Welch that he should be protected in the opportunity to build a 60-foot dam, we find nothing in the decree to grant his successor in interest such a right; but, on the contrary, it is argued here that no dam to exceed 28 feet in height can be built without infringing on the railroad. The agreement testified to by Mr. Welch was that if the Railroad Company would protect the filing of the Development Company allowing for a 60-foot dam, the Development Company would be satisfied. The Railroad Company claims it built under that agreement. Yet it claims the right, and it may have the right under the decree that has been entered in this case, to say that neither Mr. Welch nor his successor has any privilege to go above 28 feet. It even contends that the building of any dam at all, if it can be shown that such construction would interfere with the

operation of the railroad, or flood its roadbed, is not permissible.

Mr. Welch appears as a very willing witness in favor of the Railroad Company, and was ready to answer "yes" to everything the Railroad Company could suggest in its own favor. He testifies that some time in September, 1909, he saw Mr. Boschke and told him of the desire of the Development Company to be protected for the construction of a 60-foot dam; and that Mr. Boschke showed him a map which indicated a level of 64 or 65 feet above low water for the railroad. It is manifestly out of the question that Mr. Boschke should have shown him a map indicating such a level; for the Railroad Company did not have a survey indicating the level until the next April, some seven months later. It was subsequent to this interview that Boschke told Whistler the elevation was about 70 feet; and, admittedlly, none of the profiles of the Railroad Company showed the height above water level.

Going back now to the main point of defendant's contention, that because the water appropriation belonged to the Interior Department Company, our project is bound by Mr. Welch's statement, there are two answers. Until the purchase of the Interior Development Company stock and land holdings, the owners of the Sherar project, which was the main project, owning nearly all of the land and controlling the whole situation, was contented, and still is contented, to rely on its water rights as riparian owner. The Deschutes is not a navigable stream. The plaintiff company owns the

land on both sides of the river, including its bed, at the falls and for several miles above and also for a long distance below, including the power house site. It does not need to divert the water from its own land; but merely to make use of the same on its own land and to return it undiminished to the stream. This it may do as owner.

> Donnelly v. U. S., 37 Sup. Ct. Rep. 456.
> Fulton Light, Heat & Power Co., et al., v. State of New York, 37 L. R. A. (N. S.) 308.

The lower court concurred in this view.

There is no merit in the claim that the Eastern Oregon Land Company lost its right to demand performance of the agreement entered into by its predecessors in interest and the railroad company, merely because it acquired the stock and the property of the Interior Development Company. It may be conceded, for the purpose of argument, that the Interior Development Company is estopped from questioning the location of the road in the place where the same has been built, though this estoppel must be based on the testimony of Welch, and the admitted facts are quite conclusive that Welch was incorrect in his account of the transaction that took place. But, even though the Interior Development Company could not itself have asserted the rights which plaintiff asserts, clearly the plaintiff did not lose other rights which it had under contract, merely because it purchased property of a third person who could not assert similar rights. Giving full force and effect to the estoppel claimed against

the Development Company, it cannot be made to extend to the Land Company, claiming in a right other and different from that of the Development Company's right, merely because the Land Company subsequently acquired the property of the Development Company. In such instance, an estoppel may run with the property, and to the extent of the particular property, but no further.

In the last place, so far as this point is concerned, if the plaintiff, as successor of the Sherar interests, and under the agreement made with those interests, pursuant to which the defendant entered on the land, has the right to construct a 60-foot dam, what difference does it make that the plaintiff might not have acquired the right to construct more than a 55-foot dam, for instance, if this right depended solely on what it got from the Interior Development Company? Under the agreement as to the Sherar lands, the defendant has no right to limit the dam to a height less than 60 feet.

IV.

Part IV of defendant's brief is devoted to what we consider the main question of the case, argued at full length in our original brief; which is the question as to which of the parties is estopped by what transpired. Our contention is that the defendant, by its agreement with the plaintiff's predecessors in interest, is bound by contract to permit and to provide for the construction of a 60-foot dam; while defendant's contention is, that the mere knowledge that the defendant was building its road over the lands, and the mere opportunity to deter-

mine by a survey whether it was keeping its agreement as to the protection of the right to build a 60-foot dam, act as an estoppel against the plaintiff, and amount to a complete waiver of the right to construct a 60-foot dam. That point we do not desire to re-argue here, but refer the court to the discussion in the original brief.

V.

The fifth section of respondent's brief is devoted to the argument that the compensation given by the lower court is ample, for the reason that the plaintiff is not now possessed of all the land requisite to the development of a power project by the construction of a 60-foot dam. The basis of this contention is, that there are said to be lands in private ownership and lands in the ownership of the Railroad Company, which would be flooded by any dam exceeding 28 feet. The argument might be put in this way:

Here is one of the best water-power sites in this part of the world—a power site capable of sustaining the industries of a city. Here is a plaintiff company which has acquired the falls, the damsite, the power house site, the banks and bed of the stream for a distance of some three and one-half miles, and the flowage rights from the railroad company located on the west bank of the stream. But here is the defendant Railroad Company, which has entered on the lands under an agreement with plaintiff's predecessors that, if allowed to enter, it will protect the power possibilities of the site, at least to the extent of what can be developed with a 60-foot

dam. Having thus entered and built its railroad, this defendant company now says the plaintiff cannot enter at all and build a 60-foot dam or any other dam exceeding 28 feet in height, because by doing so, some of defendant's land will be flooded. It is not contended that such a dam would injure the railroad, but merely that it would be a technical invasion of its right, by flooding the margin of its right of way. Therefore, it is contended this power project is worthless, and no substantial damages should be allowed for interference therewith. We do not believe such a contention on the part of the defendant company will receive any consideration in a court of equity.

This contention of the defendant rests on the authority of certain cases, said to hold that where a plaintiff has not acquired all the land essential to its use of the property in the most advantageous way, the possibility of its devotion to that most advantageous purpose cannot be taken into consideration. Such, we submit, is not the purport of these cases. We understand them to hold, that where the plaintiff has not acquired a complete project and there is no reasonable probability that the plaintiff ever can do so, the possible use of the property for such advantageous purposes is not to be taken into consideration. But the cases the defendant cites treat of instances where the possibility of acquiring what is lacking is so remote and speculative that it cannot be taken into consideration. We submit that this is no such case. Here almost a complete project has been assembled—properties have been acquired constituting all the main fea-

tures of the project, and the lacking area is very small. Moreover, the plaintiff corporation is by the law given the power of eminent domain for the acquisition of what additional lands it may need.

Lord's Oregon Laws, §6553.

Grand Ronde Electrical Co. v. Drake, 46 Ore. 243.

Walker v. Shasta Power Co., 160 Fed. 856, 19 L. R. A. (N. S.) 725.

Henderson v. Lexington, 22 L. R. A. (N. S.) 136.

Even as against the defendant corporation, this power of eminent domain exists so long as it is not destructive of the public use to which the defendant is devoting its property. There is no contention and no evidence that the mere flooding of the margin of defendant's right of way along the river to the extent it would be flooded, three and one-half miles above the damsite, and more, would be thus destructive. This right of condemnation as against the defendant is abundantly sustained by the authorities.

Lewis' Eminent Domain (3rd Ed.), §§411-440.

15 Cyc. 612, et seq.

In re Certain Land in Lawrence, 119 Fed. 453.

P. & W. V. R. R. Co. v. Portland, 14 Ore. 188, 12, P. 265, 58 Am. Rep. 299.

State ex rel. Skamania Boom Co. v. Superior Court Skamania Co. et al., 47 Wash. 156, 91 P. 637.

Ore. Short Line Co. v. Postal Tel. Cable Co. of Idaho, 111 Fed. 842.

It is very evident from the language used by the courts that where almost a complete project is assembled, and particularly where the remainder can be readily acquired by condemnation, it will not be held that the part already assembled has no value for the contemplated purpose, because it is not complete. We call attention to the language of the court on this point in the case of *McGovern v. City of New York,* cited by respondent. That was a case of one of hundreds of different owners, and the court considered the chance of his ever acquiring a complete reservoir site too remote and speculative for consideration, and says he could not add to the value of his holding "by the hypothetical possibility of a change, *unless that possibility was considerable enough to be a practical consideration and actually to influence prices.*" What the court then says about excluding the power of eminent domain, is evidently meant to apply only to cases where no power of eminent domain exists, and where the plaintiff's holdings are such a small fraction as to possess alone no substantial value for the intended purpose.

In the later case of *New York v. Sage,* 239 U. S. 57, decided November 8, 1915, the court says:

> "The decisions appear to us to have made the principles plain. No doubt when this class of questions first arose it was said in a general way that adaptability to the purposes for which the land could be used most profitably was to be considered; and that is true. But it is to be considered only so far as the public would have con-

> sidered it if the land had been offered for sale in the absence of the city's exercise of the power of eminent domain. The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price."

It is clear that the rule for which defendant contends has no application to a project 90% complete; nor to one where the power of eminent domain is possessed. Defendant's contention proves too much. If it were the law, then the owner of all the main elements of a great water power project, running into the hundreds of thousands of dollars in value, like the one here, who might lack a little fraction of the lands necessary to complete his project, could not recover any damages against a railroad company which entered on his land and built in such a manner as to spoil his project, for the simple reason that it was not absolutely complete. By this reasoning, the right of way of a railroad 100 miles in length would have no value in court, if it still lacked one mile of right of way to get to a profitable terminus.

This question of our alleged lack of the right to flood some of the margin of defendant's right of way two and one-half miles and more above our dam by the backwater of a 60-foot dam, is one we say the defendant has no right to raise against us. The condition of building its road was that we should be allowed to build

a 60-foot dam. If in doing so, we flood some of defendant's right of way, we have a right to do so, and the decree should so provide. For defendant to stipulate that we may build a 60-foot dam, and then say that in doing so we must not flood any of its lands above 28 feet in height, would be a plain fraud.

VI.

The sixth division of respondent's brief embodies the contention that the claim for damages in this case, if any exists, belongs to the predecessors in interest of the Land Company. This contention overlooks the fact that by the terms of the agreement with the representatives of these predecessors in interest, under which the defendant entered on the lands, it was stipulated that if a sale was made under the option which plaintiff then held, the defendant must settle with the plaintiff for damages arising out of the appropriation of the land. On this point, plaintiff calls the court's attention to an extract from the testimony of Mr. Morrow, right of way agent for the defendant company, respecting his conversation with Mr. Grimes, one of the executors of the Sherar estate, and Mr. Huntington, attorney for the executors, in August, 1909, as follows: (Tr., p. 346.)

> "At that time there was an understanding had—that is, I was led to believe, in fact, I was told that some parties had an option on the property, and an understanding was had that in case the sale was made, then I should have to deal, or I must deal with the purchaser."

Attention is also called to the following sentence contained in the letter of Huntington to Morrow, dated August 25, 1909 (Pl. Ex. 29):

> "If the sale is made, as we assume it will be, then you *are to settle with the purchasers for the right of way.*"

That this conversation and letter had reference to the then pending sale of the lands to the plaintiff corporation is admitted by all the parties.

Under these circumstances, not only has there been an equitable assignment of any claim for damages accruing prior to the exercise of the option, but the defendant has expressly agreed to respond to such damages and to pay them to the plaintiff as part of the contract under which it entered.

Apart from the rights created under this agreement, the right of action arose and is vested in the plaintiff.

Plaintiff held an option to purchase this property at the time the entry took place, and this option carried with it an immediate right of possession. (See Plaintiff's Exhibit 24, Tr. p. 629, at p. 632.) Such an option creates an equitable interest or estate in land, vesting, as it does, in the person who holds it, the right to call for a conveyance of the property. Once the option is exercised, the person holding it becomes vested with the full, equitable title to the property. Until the option is exercised, his equitable interest or estate exists, but is contingent.

Mr. Justice Jessell, Master of the Rolls, decided, in the case of *London & Southwestern Ry. Co. v. Gomm,* (20 Chan. Div. 562, at 579), that an option such as this creates an interest in the land which it covers, from its inception. The question arose in that case in connection with the rule against perpetuities. The Master of the Rolls said:

> "The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land.
>
> "It appears to me therefore that this covenant plainly gives the company an interest in the land, and as regards remoteness there is no distinction that I know of (unless the case falls within one of the recognized exceptions, such as charities) between one kind of equitable interest and another kind of equitable interest. In all cases they must take effect as against the owners of the land within a prescribed period."

In the same case, Sir James Hannen said (p. 586):

> "The next question is, does this covenant create an interest or estate in the property at law, or in equity * * * I must say that it appears to me to be a startling proposition that the power to require a conveyance of land at a future time does not create any interest in that land. If it does create such an interest, then it appears to me to be perfectly clear that the covenant in this case violates the rule against perpetuity, because, taking the passage which has been cited from *Sanders,* 'a perpetuity may be defined to be a future limitation restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined.' Now this covenant plainly would restrain the future owner from aliening the estate to anybody he pleases, it restricts him to aliening it to the railway company in the event of the company exercising their option."

The Supreme Court of Oregon, in the case of *House v. Jackson, et al,* 32 Pac. (Or.) 1027, at 1029, held that an option created an equitable estate, the court saying:

> "The option having been given to Haley, could he transfer his right so that his assignee could enforce the same? The ground upon which a court enforces an executory contract for the sale of lands is that equity considers things agreed to be done as actually performed, and when an agreement has been made for the sale of lands

> the vendor is deemed the trustee of the purchaser of the estate sold; and the purchaser, trustee of the purchase money for the vendor. *The vendee, in equity, is actually seized of the estate, and, as a consequence, may sell the same before a conveyance has been executed, notwithstanding an election to complete the purchase rests entirely with the purchaser. Haley had an estate in the premises, and was equitably the owner thereof.*"

In Barton v. Thaw, 92 Atl. (Penn.) 312, the court said:

> "The option to purchase land constituted a substantial interest in the land."

See also:

> Windsor v. Mills, 157 Mass, 362.
> Woodall v. Clifton (1905), 2 Ch. Div. 259.
> Worthington Corp. v. Heather (1906), 2 Ch. Div. 538.
> Starcher v. Duty, 56 S. E. (W. Va.), 524, at 526.
> Telford v. Frost, 44 N. W. (Wis.) 835.

That the trespass complained of constitutes injury to the interest of the plaintiff existing at the time it took place, is self-evident, and that the holder of such an equitable interest may, after full, legal title has been vested in him, recover to the full extent of the trespass committed, is well settled by authority.

In a leading case in Massachusetts, *Pinkerton v. Boston & Albany R. R. Co.,* 109 Mass. 527, at 537, Ames, J., said:

"With regard to any previous taking of the land, the respondents deny the petitioner's right to recover damages, on the ground that the legal title had not vested in him at the time. But before the filing of the location of 1866, he had made a contract for the purchase of the land, and had thereby become equitably entitled to a conveyance upon the performance of the conditions of the purchase. The price which he had agreed to pay was made up on the assumption that he was to become the owner of the entire lot, unincumbered by the action of the respondents in appropriating a portion of it to their own use. Under the decree of this court, he has been compelled to fulfill his contract, and to pay the price of the entire lot. The effect of this decree is that he gets from his grantors less than he contracted for, and that all the damage resulting from the construction of the respondents' railroad falls upon him, and not upon the parties from whom he derived his title. So far as it is a question between him and his grantors, there can be no doubt that the compensation for the taking equitably belongs to him, and not to them. If it should be paid to them, the result would be that they would be paid a second time, for what they have already sold and been paid for. They have already been paid for the entire lot, and if in addition to the price paid them they were to proceed and recover damages for land, taken after they had ceased to have the equitable title, they would be liable for any

amount so recovered to the petitioner, as his trustees. It is a mere question whether he can claim the damages in his own name, or is bound to sue for them in the name of the grantors, in whom the legal title stood. *We do not think that, in proceedings of this nature, there is any inflexible rule of law that requires the court to shut its eyes to the real interests of the parties, or to refuse to take into consideration their substantial rights and equities in relation to each other. All that the respondents are entitled to is that they shall not, after paying the damages to one party, continue liable to pay them to another. If we hold that the effect of the decree, for the purpose of this trial, is to carry the petitioner's title back to the date of the deed (which the court has held was properly tendered and should have been accepted)*, exact justice will be done, and the respondents will be protected by the judgment. In *Proprietors of Locks & Canals v. Nashua & Lowell R. R. Co.*, 10 Cush. 385, *it was decided that the owners of equitable or contingent interests might properly join with the owner of the fee in the application for damages, 'and that as they would all be bound by the judgment in such case, it operates as a security to the respondents, and cannot affect them injuriously, although such petitioners are not, in a strict sense, joint owners or proprietors of the land.'*

"For these reasons, we must hold that the petitioner is also entitled to damages for the land taken in 1866, according to its value at that time."

So, also, in *Odell v. Gulf C. & S. F. Ry. Co.*, 22 S. W. (Tex.), 821, it was held that a vendee under an executory contract for the sale of land which is taken in condemnation proceedings, is entitled to compensation for his interest therein, even though he be in default, the court saying:

> "It also appears that, while the damage was done before the time specified in the obligation for the first payment to be made had arrived, he had not at the institution of this suit, which was after that time, made any payment, as provided in said instrument; but no advantage seems to have been taken by Crane and Ramsey of this default, and it seems that they were still willing to execute a deed, as therein provided, upon his complying with the terms of the instrument. Appellant was not made a party to the condemnation proceedings, but met the commissioners appointed to assess the damages, and informed them of his interest in the land, and that he claimed damages. We are of opinion that there was error in instructing the jury, under this state of fact, to return a verdict against appellant. In treating of the subject of parties to condemnation proceedings, Mr. Lewis, in his work on Eminent Domain (section 319), lays down this rule: 'In case of an executory contract of sale it is generally held that the vendee is entitled to the compensation on the ground that he is the equitable owner of the property, and that what is taken is subtracted from what he is to recover by his contract, while the

> vendor remains entitled to the whole amount of purchase money agreed to be paid. The better course, however, would seem to be to make both the vendor and vendee parties, and then the compensation can be paid to the one or the other, or apportioned between them, as may seem just to the court.' The following authorities cited in the note have been examined, and seem to sustain the text: *Railway Co.* v. *Wilder,* 17 Kan. 239; *Kuhn* v. *Freeman,* 15 Kan. 423, 426; *Railroad Co.* v. *Ingalls,* 15 Neb. 123, 16 N. W. Rep. 762; *Pinkerton* v. *Railway Co.,* 109 Mass. 527; also, *Proprietors of Locks & Canals* v. *Nashua & L. R. Co.,* 10 Cush. 385."

See also:

Clark v. *Long Island Realty Co.,* 110 N. Y. S. 697.

Fulton County v. *Amorous,* 16 S. E. (Ga.) 201, at 202.

Nixon v. Marr, 190 Fed. 913.

After the option is exercised, the rights of the plaintiff under the option relate back to the date of the agreement, and are, in point of time, prior to the date when the defendant entered on the land. We quote from 3 *Pomeroy Eq. Jr.* (3 Ed.) 1163:

> *"Time of equitable conversion in contracts of sale with option.* In contracts of sale upon the purchaser's option, the question of whether or not a conversion is effected at all cannot, of

> course, be determined until the purchaser exercises his option; but the moment when he *does* exercise it the conversion as between the parties claiming title under the vendor *relates back* to the time of the execution of the contract. Thus, where a lessee with an option to purchase—or any other purchaser with an option—duly declears his option after the death of the lessor or vendor who is the owner in fee, the realty is thereby converted *retrospectively* as between those claiming under the lessor or vendor, or under his will."

The leading decision on this point is *Lawes v. Bennett,* 29 Eng. Reprint 1111, rendered by Lord Kenyon. The syllabus of the case, which states accurately the facts and the law as decided therein, is as follows:

> "A makes a lease to B for seven years, and on the lease is endorsed an agrement that if B shall within a limtied time be minded to purchase the inheritance of the premises for 3000 pounds A would convey to him for that sum. A dies and by his will gives all his real estate (generally) to D and all his personal estate to E and D equally. Within the limited time, but after the death of A, B's assignee claims the benefit of the agreement from D, who accordingly conveys the premises to him. Held that the sum of 3000 pounds when paid is part of the personal estate of A and that E is entitled to one moiety of it as such."

Lord Kenyon says, in the court of his opinion:

> "When the party who has the privilege of making the election has elected, the whole is referred back to the original agreement."

This case has been followed in *Townley v. Bedwell,* 14 Ves. Jr., 591, and numerous English cases; also in several decisions in this country. *Kerr v. Day,* 14 Pa. St., 115; *Holland v. Cruft,* 26 Pa. St., 169; *Keep v. Miller,* 42 N. J. Eq., 107.

It seems to have been approved by Mr. Justice Wolverton, who wrote the opinion in the case of *Clarno v. Grayson,* 30 Ore. 125, where in discussing an option, Judge Wolverton says:

> "It is said that when the option has been declared it takes effect as an equitable conversion by relation back to the date of the original contract: *Kerr v. Day,* 14 Pa. St. 112 (53 Am. Dec., 526); *Ripley v. Waterworth,* 7 Ves., 436; 3 *Pomeroy Equity Jurisprudence,* Sec. 1163."

See also on the same point, *Estes v. Furlong,* 59 Ill. 298; *Peoples Street Ry. Co. v. Spencer* (Pa.), 36 Am. St. Rep. 22; *Frick's Appeal,* 101 Pa. St. Rep. 485.

While the rule of relation is not of universal application, it is a proper rule to apply it so far as the right to recover damages from a tort feazor is concerned. Were it otherwise, property subject to an option might be trespassed upon at will and no recovery could be had if the option were exercised, as under such circumstances

the owner of the property would have suffered no damages, having received the full price which he had contracted to take, and the holder of the option would, under the rule invoked by our opponents, be unable to recover damages from the trespasser.

It is also to be borne in mind that the Sherar heirs conveyed the said lands to the plaintiff by warranty deeds, and if the lands, at the time of their conveyance, were subject to an easement in favor of the railroad company, the same constituted a breach of the covenant of warranty. To avoid circuity of action, equity would treat the warranty as an assignment to the plaintiff of any right of action against the Railroad Company which may have existed in favor of the Sherar heirs.

By its prayer for relief herein the defendant has, in its answer to the second amended complaint, submitted to the court the question of the amount of damages arising by the taking of the said lands, and has prayed the court to determine the damages and to decree to the defendant a title to its right of way upon the payment of such damages.

But the primary redress for which plaintiff is contending is not that of damages for the ruining of the water power project, but for a decree that shall protect us in the right to construct our project with a 60-foot dam.

VII.

In the seventh division of the Railroad Company's brief (p. 91), the contention is made that because of the withdrawals which had taken place pending the Sherar selections, the right of way meantime granted to the Railroad Company acquired priority and became paramount to the said Sherar selections.

The court below had held that said grant of a right of way acquired priority because of the doctrine enunciated in the case of *Daniels v. Wagner,* since reversed. In view of this reversal, of course it becomes necessary for the Railroad Company to find a new ground to sustain the grant of the right of way.

The ingenious contention now made is, that by the said withdrawals, all existing entries were absolutely terminated; that the lands withdrawn constituted a reservoir site; and that the grant of the right of way to the Railroad Company took effect under the Act of March 3, 1899, 30 Stat. 1233; 7th Fed. Stat. Ann., 1099.

There are several serious faults in this theory. It is obvious that if the lands were not a reservoir site, then the grant of a right of way could not take effect under the Act of March 3, 1899. The contention that this narrow, precipitous canyon was ever intended by the Government to be a reservoir site, is an obvious absurdity; and is entirely lacking any support in the record. The Act of June 17, 1902, is not particularly a reservoir act, and there is not a hint in the record that the lands were withdrawn for a reservoir. The secretary did not undertake to cancel existing entries, as is self-evident from the

> ment, in dealing with the public lands, as equivalent to a patent issued, and when the patent does issue, it relates back to the inception of the right of the patentee."

When the case was considered in the Supreme Court, that Court used the following expressions touching the same point (190 U. S. 301; 23 S. Ct. R., 696):

> "It may be that when the decision of the Land Department is made, if it be favorable to the applicant, the complete equitable title claimed will accrue from the time the selection of the lands was made in the local land office, and when the patent subsequently issues, the legal title will vest from the time of selection."

It seems to us evident that the defendant cannot prevail on any such grounds. Our selections were never canceled, but passed to patent. The rights acquired thereunder relate back to the initiatory act, which antedates anything the defendant company did to acquire a right of way.

DEFENDANT'S CROSS-APPEAL AS TO COSTS.

The Railroad Company made no tender and no offer to pay compensation until after the litigation was begun. Its license from the Sherar estate provided that it must settle with the purchaser (plaintiff corporation) for the right of way, as well as preserve the hydraulic possibilities of the site. Such a license to enter as it claims to have had was no waiver of damages.

Lewis on Em. Domain (3rd Ed.) Sec. 889.

Payne v. Morgan S. S. Co., 43 La. Ann. 981; 10 So. 10.

Webster v. Kansas City R. R. Co., 116 Mo. 114; 22 S. W. 474.

Childs v. Kansas City R. Co., 117 Mo. 414; 23 S. W. 373.

Longworth v. Cincinnati, 48 Ohio St., 637; 29 N. W. 274.

Cowan v. So. Ry. Co., 118 Ala. 554; 23 So. 754.

San Antonio Ry. Co. v. Hunnicutt, 18 Tex. Civ. App. 310; 44 S. W. 535.

Castles Bros. v. City of New York, 137 N. Y. S. 734.

Beck v. Lewisville N. Ry. Co., 3 So. 252.

Moreover, the defendant company has throughout the litigation sought, and still seeks, to deprive the plaintiff of the rights plaintiff has under the stipulation pursuant to which defendant entered. We submit that this court ought not to disturb the ruling of the court below on the question of costs; but that the decree on the merits should be modified as contended for in our opening brief.

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No. 2814

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EASTERN OREGON LAND COMPANY
a Corporation
APPELLANT

vs.

DES CHUTES RAILROAD COMPANY
a Corporation
APPELLEE

DES CHUTES RAILROAD COMPANY
a Corporation
CROSS-APPELLANT

vs.

EASTERN OREGON LAND COMPANY
a Corporation
CROSS-APPELLEE

Supplemental Brief of Appellee and Cross-Appellant DesChutes Railroad Company

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a corporation,
Appellant,

v.

DES CHUTES RAILROAD COMPANY,
a corporation,
Appellee.

DES CHUTES RAILROAD COMPANY,
a corporation,
Cross-Appellant,

v.

EASTERN OREGON LAND COMPANY,
a corporation,
Cross-Appellee.

Supplemental Brief of Appellee and Cross-Appellant

DesChutes Railroad Company

ARGUMENT

Appellant has filed what purports to be a reply brief herein. The matter, however, contained on pages 1 to 14, inclusive, in case appellant intended to make any use thereof, should in our opinion have been included in its opening brief. Appellee was not

given an opportunity to answer the same and we are therefore filing a short statement in answer thereto.

This matter is another illustration of the shifting by appellant from one position to another.

The position is now taken in the brief and was stated by Mr. Veazie in his closing oral argument, that the main object of the appellant is to preserve its right to construct a dam and develop the water power in the Des Chutes River at the dam site in question and that the decree fails to do this. An examination of the decree (Trans. p. 126, *et seq.*) will disclose that the appellant's counsel are mistaken in this. The decree adjudges the rights of the parties in the three different classes of lands involved. After defining the rights in the property title to which was in the Government at the time of the commencement of this suit, the decree states: "Provided, however, that the right hereby decreed to defendant shall not be understood or considered to interfere with or deprive complainant or its successors in interest of the right to construct and maintain a dam for hydraulic purposes in the Des Chutes River where it passes through such property, and installing in connection therewith appliances for the purpose of developing hydraulic and electric power for all purposes, provided the track or roadbed of defendant shall not thereby be flooded or damaged or the operation of its road interfered with."

A similar provision is contained in said decree after that part of the decree defining the rights in

the property acquired from the Interior Development Company, and over that property title to which was admitted to be in the Sherar heirs prior to the commencement of the suit and acquired by the complainant from the Sherar heirs, the Court gives the defendant a right of way upon the payment of $1,000 and enjoins the complainant from interfering with the line of the Railroad Company "except as permitted by this decree," thus preserving to the complainant the right to construct its works in the manner as defined in the former part of the decree.

From the start of this case the Railroad Company conceded that its line is high enough for the purpose of permitting the construction of a dam and power development, in fact, that it is high enough to permit the construction of a 60-foot dam, provided proper means are taken to take care of the flood water. As a matter of fact, the line was raised to this elevation for this very purpose, and defendant supposed that it was entirely satisfactory to all concerned. Had the present contention of the appellant been its true contention at the time of the commencement of this suit, this case would never have been commenced. The Railroad Company was at all times ready and willing to meet the Land Company more than half way to enable both to work out their respective constructions to their best mutual advantage, but the Land Company, after the grade of the railroad was completed, stepped in and asserted that the Railroad Company had no rights whatever at the location and insisted upon its full pound of

flesh. The lower court in its decree permitted the Land Company to take its full pound of flesh as it insisted, but refused to permit it to take any blood.

In order to secure the decree appellant is now contending for it must rely upon something more than its mere legal right. It must have some contract right.

Having insisted upon its full legal rights and having maintained that there was no contract, it certainly should be satisfied with a decree which fully protects its legal rights and should not now be heard to object. The decree gives to the Land Company the utmost it was entitled to in the matter of preserving its right to construct a dam and develop the water power.

As respects the Land Company itself, its testimony is positive that it had no contract with the Railroad Company and that it purchased the land after it had ascertained from its predecessors in interest that none of them had. Mr. Martin, the president of the Land Company, testified (Trans. p. 205):

"I ascertained that the people from whom we were buying the property had not in any way involved the property in any *promises or agreements or deeds or any act at all which involved the question of right of way.* What remained to be settled after we bought was the question of whether the railroad had ever had any right to come on there at all or not." This testimony was given by Mr. Martin at the time of the trial after the complaint had

been finally amended to allege that the Land Company had purchased the property on the faith and knowledge of the alleged agreements of the predecessors in interest of the Land Company with the Railroad Company by which the Railroad Company had agreed to construct at such elevation as to permit of the construction of a 60-foot dam.

Had the court found that any contract rights existed, it would have had to find this testimony of Mr. Martin to be untrue. The court therefore refused to find that any such contract rights existed and proceeded to find what the legal rights of the parties were, as if no such contracts existed, and in view of this testimony of Mr. Martin that was exactly what the Land Company desired, and it certainly should not now be heard to object to the action of the lower court in this regard. Without any contract rights the right of the owner of the Sherar property was limited to the raising of the water 28 feet at the dam site, because any additional height would flow the water back upon land not owned by the Land Company and which was in fact owned by the Railroad Company. This limitation also applies to the predecessors of the Land Company in the ownership of the Sherar property. Laughlin, the owner of the option to purchase under which the Land Company acquired the Sherar lands, positively denied any agreement with the Railroad Company for any height of dam, but strenuously asserted that the Railroad Company was to go up to such height as it could to preserve the power possi-

bilities and to pay for any damage it did to the power development of the property.

Anything over 28 feet at the dam site would give the property the full limit of its power development and therefore would damage the power development of the property in no way. Similarly with regard to the Sherar heirs. The permit from them is contained in the letter from Huntington to Morrow of August 25, 1909, (Trans. p. 175) and is "provided that the road is constructed sufficiently above the river as that it will not interfere with the use of the property for hydraulic purposes." Likewise here any height over 28 feet did not interfere with the property for hydraulic purposes, for that was the limit to which the water could be raised without the use of the property not owned by the Sherars, and in fact owned by the Railroad Company itself.

If the Land Company had any rights to build above 28 feet it acquired such rights from the Interior Development Company, for Mr. Welch, the president of that company, testified that with the maps and profiles of the Railroad Company and the Development Company before them, it was decided that if the Railroad Company built on the line shown by its maps and profiles, that would permit the construction of a dam 60 feet high by making provision in the dam to take care of the flood waters, and if the Railroad Company constructed at that height, it could have its right of way free over the lands of the Development Company. There was nothing in this arrangement with the Development

Company that the railroad should protect its banks and fills. All it was required to do was to construct at the elevation at which it did. The lower court did find that this arrangement existed as far as the Development Company was concerned and that the Railroad Company had thus earned its right of way across the lands of that company. The only obligation, therefore, on the Railroad Company was to raise its grade to a height to protect the power development of the Sherar property, which was 28 feet, and as far as the Development Company was concerned, to construct where the line is now constructed. The Development Company was apparently satisfied that it could construct in such a manner as not to damage or injure the Railroad Company, and, in fact, all the engineers seem to agree that this can be done. As far as the control of the height of the water is concerned, this can be done by proper construction of the dam; as far as the fills of the roadbed are concerned, by riprapping, which can be done at little expense. We might suggest that if the force of men which has been maintained there for a number of years working aimlessly, throwing rocks into the river under the colorable pretense of constructing a dam for the purpose of preserving the water appropriation and preventing it lapsing, and in which Mr. Martin testified they had expended $14,000, had been put to work riprapping, they could have served some useful purpose and accomplished all the riprapping necessary to preserve the entire roadbed from damage.

But the Land Company is now attempting to engraft an additional obligation upon the railroad not required under the agreement with the Development Company and certainly not required under the legal rights of the parties as to the Sherar property at any height above 28 feet or on any property not acquired from the Sherars. The demands of the Land Company now made seem to contemplate that the Railroad Company shall riprap or protect its roadbed on its own lands above the lands owned by the Sherars and on which to this day no flowage rights have been acquired. The Land Company assumes not only that it has the rights to flow this right of way, but in addition that the Railroad Company shall be required to riprap and protect it, whereas the very most which it has any right to demand is that the railroad should protect its roadbed on the lands of the Sherars to a height of 28 feet. But even this it has no right to demand, for it offered no proof as to what this would amount to, and the amount of damages awarded by the court in the absence of any proof covers all damage to the Land Company, and if any such damage as that now referred to was contemplated, it had its opportunity to present testimony thereon and cannot complain because it failed to do so. As to the Development Company, no such requirement was imposed on the Railroad Company and the Development Company agreement was fully complied with.

It should also be considered that the Railroad Company spent over $100,000 more in construction

of its road at the elevation at which it was constructed, than it would have been required to spend if constructed at the elevation at which it was originally surveyed. This fact was known to the owners of the land at this dam site and undoubtedly considered a sufficient consideration to get the railroad to go up to this elevation with the power developers to protect the roadbed when they got ready to make their development.

The decree of the lower court therefore fully protected the rights of the Land Company as to its power development, and this Court should not impose an additional obligation upon the railroad not contemplated in the agreement with the Development Company and not imposed by law, and now for the first time asserted by the Land Company.

Respectfully submitted,

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